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Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 268

THE SUGAR INSTITUTE, INC., THE AMERICAN SUGAR REFINING COMPANY, MARGARET A. JAMISON, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 22, 1935.

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

E-59-103

THE SUGAR INSTITUTE, INC., et al., Appellants,

against

UNITED STATES OF AMERICA, Appellee

PRÆCIPE FOR TRANSCRIPT OF RECORD

The Clerk of the United States District Court for the Southern District of New York will please prepare the Record in the above named and numbered cause and certify the same to the Supreme Court of the United States, including in said Record only the following:

1. Petition, filed March 30, 1931.
2. Order substituting J. D. & A. B. Spreckels Investment Company as a defendant in the place and stead of J. D. & A. B. Security Company, filed May 12 ,1931.
3. Answer, filed August 3, 1931.
4. Order of April 8, 1932 amending Petition, filed April 8, 1932.
5. Order of April 20, 1932 amending Petition, filed April 31, 1932.
6. Opinion, filed March 9, 1934.
7. Findings of Fact and Conclusions of Law, filed October 9, 1934.
8. Final Decree, filed October 9, 1934.
9. Narrative Statement of Evidence.
10. Order Approving Narrative Statement of Evidence as true, complete and properly prepared.
11. All of Appellee's Exhibits except those exhibits enumerated in Annex A, attached hereto and made a part hereof.

[fol. 3] 12. All of Appellants' Exhibits except those exhibits enumerated in Annex B, attached hereto and made a part hereof.

13. Petition for Appeal, filed December 8, 1934.
14. Assignment of Errors, filed December 8, 1934.

15. Statements disclosing basis of jurisdiction of Supreme Court, filed December 8, 1934.

16. Order Allowing Appeal, filed December 8, 1934.

17. Appeal Bond, filed December 8, 1934.

18. Citation on Appeal, filed December 24, 1934.

19. Notice to Appellee and Acknowledgment of Service of copies of Petition for and Order Allowing Appeal, Assignment of Errors, Findings, Bond, and Statement as to Jurisdiction, filed December 14, 1934.

20. Præcipe for Transcript of the Record.

21. Certificate of the Clerk of the District Court that the foregoing documents (1 to 20, inclusive,) constitute a true copy of the material parts of the Record.

Sullivan & Cromwell, Solicitors for Appellants.

Service of the foregoing Præcipe and receipt of a copy thereof this 3rd day of July, 1935, is hereby admitted and acknowledged.

Walter L. Rice, Solicitor for Appellee.

[fol. 4] Annex A

The following exhibits or portions of exhibits of appellee are to be omitted from the transcript of the Record:

Exhibits 21-26 (Minutes of Directors and Executors Committee meetings). Omit the paragraphs dealing with raw sugar polarization allowances and raw sugar differentials appearing on pages 14, 24, 26, 27, 32, 47 and 49 of these exhibits. Omit the paragraphs dealing with a Credit Bureau and credit reports appearing on pages 55, 62, 67, 119, 248, 341, 368 and 383 of these exhibits. Omit the paragraphs dealing with fines and penalties appearing on pages 446, 448, 449, 477, and 481 of these exhibits. Omit the paragraphs dealing with voluntary assessments appearing on pages 503, 536, 537, 559 and 578 of these exhibits.

Exhibits 265-268 inclusive
402-402c inclusive
403
403a
404-404b inclusive
405
406
414-414p inclusive

419 1-2
419 m-2
419 v-3-419 w-3 inclusive
419a-4
419d-4
419e-4
442
446-446f inclusive
509
[512-526]*

[fols. 5 & 6] Annex B

The following exhibits of Appellants are to be omitted from the transcript of the Record:

Exhibits	Exhibits
G	J6
H	X7
O	H8 id.
S id.	I8 id.
T	U-8
R1	Y-8
O2 id.	Z-8
P2 id.	A-9
[Q2-Qd, inclusive)]*	B-9 id.
U3	E-9 id.
V3	T9
W3	B-10
Z3	C 10
A4	F 10 id.
B4	L 10 id.
C4	M 10
D4	[Q-14]*
E4	J 16
F4	H 17
F6	I 17
G6	N 17
H6	Q 17
16	U 17

[*Words and figures enclosed in brackets erased in copy.]

[fol. 7] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR ADDITIONAL PORTIONS OF RECORD

The Clerk of the United States District Court for the Southern District of New York will please prepare the following additional portions of the record in this cause, which portions were not included in appellants' Præcipe of July 3, 1935, and certify the same to the Supreme Court of the United States:

1. The attached narrative statement of testimony relating to the subjects described below, said narrative statement being taken from the testimony of appellants' and appellee's witnesses at the pages indicated:

A. Fines and Penalties:

Sherman L. Brown, Rider 1 (p. 1330)
C. A. Humphrey, Rider 2 (p. 2814)
Wilbur L. Cummings, Rider 3 (pp. 5047-5054)
Martin Goetzinger, Rider 4 (pp. 5397-5401)
Henry E. Worcester, Rider 5 (pp. 5581-5588)
Louis V. Place, Rider 6 (pp. 8216-8219)

B. Attempted bribes by Chinal, Institute investigator:

(1) The Detroit Incident:

[fol. 8] Harold L. Brown, Rider 7 (pp. 893-899)
Harold L. Brown, Rider 8 (pp. 945-948)
Harold L. Brown, Rider 9 (pp. 952-998)
Harold L. Brown, Rider 10 (pp. 1022-1025)
Harold L. Brown, Rider 11 (pp. 1028-1030)
Helen V. Winans, Rider 12 (pp. 1044-1053)
William L. Patterson, Rider 13 (pp. 9332-9339)
Laura M. Snider, Rider 14 (pp. 9352-9362)
Frank Duffy, Rider 15 (pp. 9366-9373)
Daniel McFarren, Rider 16 (pp. 9384-9404)

(2) The Indianapolis Incident:

Eugene O'Riley, Rider 17 (pp. 1130-1134; 3996-4039)
George D. Champion, Rider 18 (pp. 3217-3237).

C. Blacklisting of Olender and other sugar distributors:

Louis V. Place, Rider 19 (pp. 7611-7721)
Evan T. Fisher, Rider 20 (pp. 7525-7544)
John L. Many, Jr., Rider 21 (pp. 8740-8743)
Charles B. Castle, Rider 22 (pp. 8943-8951)
Martin Goetzinger, Rider 23 (pp. 9317-9322)
Mark W. Lowe, Rider 24 (pp. 9326-9328)
John W. Lowe, Rider 25 (pp. 9856-9857)

2. Appellee's Exhibits:

265-268 inclusive (Relating to fines and penalties)
402-402c " " " " " "
403 " " " " " "
403a " " " " " "
404-404b " " " " " "
405 " " " " " "
406 " " " " " "
414-414p inclusive (Relating to blacklisting of Olender, a sugar distributor)
419-1-2 (Relating to blacklisting of customers)
419-m-2 (Relating to blacklisting of customers)
419 v-3-419 w-3, incl. (Relating to blacklisting of customers)
419-a-4 (Relating to blacklisting of customers)
419-d-4 (Relating to blacklisting of customers)
419-e-4
[442 (Relating to restraint on concessions)]*

[fols. 9-11] 446 (Relating to Western Sugar Refinery's withdrawal from a competitive area in the South)
[512-526 inclusive (Relating to breakdown of statistics on refiners' assets, expenses, Etc.)]*

3. Appellants' Exhibits:

G (Relating to Chinal conversation regarding bribe)
H (Relating to Chinal conversation regarding bribe)
O (Statement of savings account)
T (Relating to Beet Sugar differential, Edgar letter)
R1 (Chinal's check of $1260.59)
[Q2-Q2d, inclusive (Relating to complaints by Rogers, a large distributor)]*

[*Words and figures enclosed in brackets erased in copy.]

F6 (Relating to credit meeting)
G6 (Relating to contract enforcement)
H6 (Relating to contract enforcement)
I6 (Relating to contract enforcement)
J6 (Relating to blacklisting of customers)
X7 (Relating to blacklisting of customers)
Y8 (List of buyers blacklisted)
Z8 (List of buyers blacklisted)
A9 (Sales to blacklisted buyers)
T9 (Revere's sales to blacklisted customers)
B-10 (Summary of blacklisted customers)
C-10 (Arbuckle's sale to blacklisted customers)
M-10 (Deliveries to blacklisted customers)
[O-14 (Relating to consignment stocks)]*
J-16 (Summary of blacklisted customers)
N-17 (McCahan's customers receiving concessions)
Q-17 (McCahan's sales to Olender)

4. Stipulation regarding accuracy of narrative statements.

5. This Præcipe.

Walter L. Rice, Solicitor for Appellee.

Service of the foregoing Præcipe and receipt of a copy thereof this third day of July, 1935, is hereby admitted and acknowledged.

Sullivan & Cromwell, Solicitors for Appellants.

[fol. 12] In United States District Court

Equity No. —

United States of America, Petitioner

v.

The Sugar Institute, Inc., et al., Defendants

Petition—Filed March 30, 1931

To the Honorable Judges of the United States for the Southern District of New York, Sitting in Equity:

The United States of America, by its attorney for the Southern District of New York, and by John Lord O'Brian,

---

[*Words and figures enclosed in brackets erased in copy.]

the Assistant to the Attorney General, and James Lawrence Fly and Walter L. Rice, Special Assistants to the Attorney General, brings this proceeding in equity against:

I

Description of Defendants

(¶ 1) The Sugar Institute, Inc., hereinafter called the Institute, which is a membership corporation organized [fol. 13] under the laws of the State of New York, and which has its office at 129 Front Street, New York City;

(¶ 2) Against the following corporations and concerns, members of the Institute and duly organized and existing under the laws of the respective states indicated in the following table:

Description of Corporations and Firms

Name	Location of principal office	State of incorporation
The American Sugar Refining Company,	117 Wall St., New York, N. Y.	New Jersey.
Margaret A. Jamison and Martha A. Jamison, doing business under the firm name and style of Arbuckle Bros.	71 Water St., New York, N. Y.	
California & Hawaiian Sugar Refining Corp., Ltd.,	215 Market St., San Francisco, Calif.	California.
The Colonial Sugars Co.	136 Front St., New York, N. Y.	New Jersey.
Cuban-American Sugar Co.	136 Front St., New York, N. Y.	New Jersey.
Godchaux Sugars, Inc.	1012 Masonic Temple Bldg., New Orleans, La.	New York.
William Henderson, Hunt Henderson, Christ Gamble, and Fred Gamble doing business under the firm name and style of Henderson Sugar Refinery,	749 South Peters St., New Orleans, La.	
Imperial Sugar Co.	Sugar Land, Texas	Texas.
W. J. McCahan Sugar Refining & Molasses Co.	101 So. Front St., Philadelphia, Pa.	Delaware.
The National Sugar Refining Co. of New Jersey.	129 Front St., New York, N .Y.	New Jersey.
Pennsylvania Sugar Co.	1037 No. Delaware Ave., Philadelphia, Pa.	Pennsylvania.
Revere Sugar Refinery	333 Meford St., Charlestown, Mass.	Massachusetts.
Savannah Sugar Refining Corp.	Savannah Bank & Trust Co. Bldg., Savannah, Ga.	New York.
Spreckels Sugar Corp.	82 Wall St., New York, N. Y.	Delaware.
Texas Sugar Refining Corp.	Texas City, Texas	Delaware.
J. D. & A. B. Spreckels Securities Co. (doing business under the trade name of Western Sugar Refinery).	2 Pine St., San Francisco, Calif.	California.

(¶ 3) And against the following individuals, who are active in the management of the Institute and in the direction of the activities hereinafter described, who are citizens [fol. 14] of the States of the United States, resident therein as indicated below, and who occupy and/or have occupied the respective positions indicated opposite their names:

Description of Individual Defendants

Names	Affiliation	Residence
J. F. Abbott	Director of the Institute and President of American Sugar Refining Co.	New York, N. Y.
Earl D. Babst	Honorary President of the Institute and Chairman of the Board of Directors of American Sugar Refining Co.	New York, N. Y.
W. Edward Foster	Director of the Institute and Vice Chairman of the Board of Directors of the American Sugar Refining Co.	New York, N. Y.
J. P. Cody	Sales manager of Arbuckle Bros	New York, N. Y.
M. E. Goetzinger	Secretary, Member of the Executive Committee, and Director of the Institute, and General Manager of Arbuckle Bros.	New York, N. Y.
George M. Rolph	Director of the Institute and President of California & Hawaiian Sugar Refining Corp.	San Francisco, Calif.
William B. Tyler	Director of the Institute and officer of California & Hawaiian Sugar Refining Corp., Ltd.	San Francisco, Calif.
C. B. Newman	Sales manager, Colonial Sugars Co.	New York, N. Y.
George E. Keiser	Director of the Institute and President Colonial Sugars Co.	New York, N. Y.
Jacob Moog	Director and Member of the Executive Committee of the Institute and Senior Vice President of Godchaux Sugars, Inc.	New Orleans, La.
I. H. Kempner	Director of the Institute and President of Imperial Sugar Co.	Sugar Land, Texas.
Harry G. Thompson	Director of the Institute and Sales-manager of Imperial Sugar Co.	Sugar Land, Texas.
Louis V. Place	Director of the Institute and Vice President of W. J. McCahan Sugar Refining & Molasses Co.	Philadelphia, Pa.
Manuel E. Rionda	Treasurer of the Institute and President of W. J. McCahan Sugar Refining & Molasses Co.	Philadelphia, Pa.
James H. Post	Chairman of the Board of Directors and President of the Institute, and President of National Sugar Refining Co. Chairman of the Board of Cuban-American Sugar Co.	New York, N. Y.
Charles D. Bruyn	Member of Executive Committee of the Institute and Vice President of National Sugar Refining Co.	New York, N. Y.
William H. Hoodless	Chairman of the Board of Directors and Member of Executive Committee of the Institute and Vice President of Pennsylvania Sugar Co.	Philadelphia, Pa.

[fol. 15]

Names	Affiliation	Residence
Henry E. Worcester	Vice President, Member of Executive Committee, and Director of the Institute and Vice President of Revere Sugar Refinery.	Charlestown, Mass.
Benjamin O. Sprague	Director of the Institute and President of Savannah Sugar Refining Corp.	Savannah, Ga.
Thomas Oxnard	Director of the Institute and Vice President of Savannah Sugar Refining Corp.	Savannah, Ga.
Rudolph Spreckels	Director of the Institute and President of Spreckels Sugar Corp.	New York, N. Y.
W. W. Harper	Director of the Institute and Vice President of Spreckels Sugar Corp.	New York, N. Y.
Edgar H. Stone	Director of the Institute and Director of Spreckels Sugar Corp.	New York, N. Y.
Alexander Smith	Director of the Institute and President of Texas Sugar Refining Corp.	Texas City, Texas.
H. B. Moore	Director of the Institute and Vice President and General Manager of Texas Sugar Refining Corp.	Texas City, Texas.
Frank E. Sullivan	Vice President and Director of the Institute and President of Western Sugar Refinery.	San Francisco, Calif.
Fred G. Taylor	Executive Vice Secretary of the Institute.	New York, N. Y.

II

Jurisdiction

(¶ 4) This action is brought to prevent further restraints of interstate trade and commerce contrary to the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," together with acts amendatory thereof and supplemental thereto.

(¶ 5) The Institute is a trade association in the sugar refining industry organized and conducted by defendants within the Southern District of New York. The defendants [fol. 16] entered into the combination and conspiracy hereinafter described within said district and other places of the United States, and many of the acts pursuant thereto were committed within said district. Some of the Members maintain offices for the regular transaction of business within said district, and the interstate trade and commerce hereinafter described has been conducted and is now being conducted in part within said district.

III

The Interstate Commerce

(¶ 6) The Members comprise all of the cane sugar refiners of the United States who are engaged in importing raw cane sugar and converting it into refined cane sugar. Said Members refine more than 98% of the cane sugar and more than 85% of all granulated sugars consumed in the United States. They have produced approximately five million tons of sugar yearly, having a value of more than one-half billion dollars.

(¶ 7) The Members for many years last past to and including the date of the filing of the petition herein have maintained refineries in various States of the United States and there have been engaged on a large scale in importing, and/or purchasing directly after importation, raw cane sugar from Cuba, Porto Rico, Hawaii, the Philippine Islands, and other localities and foreign countries, and in [fol. 17] manufacturing, that is to say, refining therefrom, cane sugar for sale and ready for consumption, and in contracting for the sale, shipment, and delivery of, such refined sugar in large quantities to thousands of purchasers thereof in States and foreign nations other than where said refineries are located and where said sugar has been refined. Pursuant to said contracts, and otherwise, the Members have sold said sugar, and have caused the shipment thereof by rail and/or water, and otherwise, across State and national boundaries, and the delivery thereof to such purchasers in said other states and foreign nations, and have thus carried on interstate and foreign trade and commerce within the meaning of the Act of Congress approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies." Hereinafter refined cane sugar will be referred to as sugar. Prior to the formation of the conspiracy herein described, defendant manufacturers were in competition and, but for said combination, would still be in competition with each other in said trade and commerce.

IV

The Conspiracy

(¶ 8) Since January 1, 1928, and for several months prior thereto, continuously to and including the time of the

filing of the petition herein, defendants, each well knowing all of the matters hereinbefore alleged, have engaged in an [fol. 18] unlawful combination and conspiracy to restrain, and pursuant thereto have actually restrained and are now restraining, the aforesaid interstate and foreign trade and commerce in sugar by various means and devices, among them being the following:

A. (¶ 9) Defendants have created, maintained and utilized the Institute as an instrumentality for promoting and maintaining the conspiracy herein described; a major part of the activities herein described have been carried on through the Institute, and have constituted its chief activities; many of such activities have been entirely outside the scope of the announced purposes of its organization; and other activities described in this petition have been carried on independently of the Institute;

B. (¶ 10) Defendants have agreed to establish and maintain and pursuant thereto have concertedly established and maintained, enhanced, uniform, and non-competitive prices; uniform, non-competitive, onerous, and oppressive terms, discounts, conditions, concessions, and extra charges; and uniform, artificial and non-competitive transportation charges;

C. (¶ 11) Defendants have agreed upon and concertedly adopted a Code of Ethics, and at various times have agreed upon and concertedly adopted amendments thereof and Code Interpretations embodying restrictive rules and provisions supplemental thereto. The Code of Ethics, amend- [fol. 19] ments thereof, and the Code of Interpretations will hereinafter be designated as the Code;

D. (¶ 12) Defendants have concertedly adopted and maintained a comprehensive system for the exchange of detailed and complete information relating to the prices, terms, and conditions of current and future sales; they have agreed that the prices, terms, and conditions of sale shall be reported to the Institute by the Members as a condition precedent to any sale of sugar; and they have agreed that no Member shall deviate from, or change, such prices, terms, or conditions until such Member shall have given at least 18 hours notice of such deviation or change. The Institute has immediately relayed all such reports by wire to all Members. Defendants have sold and are now selling

all sugar under a binding mutual agreement to adhere strictly, and without deviation, to the prices, terms, and conditions reported to the Institute, and to maintain such prices, terms, and conditions until they shall have given at least 18 hours notice of proposed changes and deviations as aforesaid;

E. (¶ 13) Defendants have agreed to abolish, and have concertedly abolished, all discounts and concessions in prices based upon quantity purchases; and all special terms, conditions, freight charges, advantages, and privileges, which, prior to the formation of the conspiracy, were given to various customers as an inducement to purchase, and which, in a market free from artificial restraints would still be given;

[fol. 20] F. (¶ 14) The Members have agreed to report, and have concertedly reported, the location, amount, exact description, and reason for selling damaged sugars and frozen stocks of sugar, as a condition precedent to selling such sugars at a price lower than the respective Member's reported price. The Members have further agreed to report, and have concertedly reported, each instance of sale of such sugars, the date of sale, the amount sold, the name and location of the buyer, the selling price, and the character of the damage. The Institute disseminates to all Members such information relating to the proposed and to the completed sales of such sugars. Pursuant to agreements, understandings, and concert of action among the defendants, the Institute is empowered to restrict, limit, and control the sale of such sugars; and in many instances the Institute has restricted, limited, and controlled such sales;

G. (¶ 15) Defendants have agreed to restrict and limit, and have concertedly restricted and limited the use of certain varieties of bags and other containers used in the packing, delivery, and sale of sugar;

H. (¶ 16) Defendants have agreed to restrict, limit, and prevent, and have concertedly restricted, limited and prevented the shipment of sugar in pool cargoes by vessels privately chartered by buyers at special rates;

I. (¶ 17) Defendants have exacted assurances from brokers, jobbers, wholesale grocers, and other corporations [fol. 21] engaged in selling sugar throughout the United

States, that they will adhere to and maintain the various prices, terms, conditions, and freight charges agreed upon by defendants; and to this end in many instances the Institute has threatened to blacklist, has blacklisted, and has employed other coercive devices against, brokers, jobbers, and wholesale grocers;

J. (¶ 18) Defendants have, during a major portion of the period covered by this petition, operated under agreements that they will not pay any part of the freight charges where the effect of doing so would be to interfere with the uniform freight application (i. e., the arbitrary freight charge agreed upon and concertedly adopted by defendants) actually paid on the preponderating volume of sugar flowing into a particular community; and that wherever any Member does pay a portion of the freight charges, said Member will promptly notify the Institute and explain fully the reason therefor;

K. (¶ 19) Defendants have agreed that they will not sponsor, encourage, or allow any commercial practice, on the part of purchasers, brokers, jobbers, warehouse companies, or wholesale grocers, which tends to lower or vary the prices at which sugar is sold by refiners and by wholesale jobbers;

L. (¶ 20) The Members' refineries are located in the states of New York, Massachusetts, New Jersey, Pennsylvania, Maryland, Georgia, Louisiana, Texas, and California. Shipments from said refineries to points in other [fol. 22] states are made by rail and/or water. Prior to the formation of the conspiracy freight charges constituted a substantial part of the cost to the customers and were therefore the subject of active competition among the Members; a substantial portion of such freight charges was absorbed by the Members to the material benefit of their customers; purchasers exercised an unrestrained choice of points at which they would take delivery, and in many instances they purchased f. o. b. refinery or f. o. b. intermediate points, from which they transited or retransited to points of ultimate destination; and purchasers exercised an unrestrained choice of available transportation rates, means, and routes. Defendants have agreed upon and concertedly adopted a comprehensive plan for maintaining arbitrary and uniform freight charges, pursuant to which they have restricted and prevented the choice by purchasers

of points of delivery and of rates, means, and routes of transportation set forth herein, and in many instances have prevented sales and shipments as aforesaid; accordingly they have agreed upon and concertedly advocated, adopted, and required the following:

(¶ 21) Purchasers must specify at the time of entering their orders the precise destination of the sugar so ordered, and must not deviate from such specifications;

(¶ 22) Purchasers must sign uniform contracts containing a provision, inter alia, that carriers may furnish the [fol. 23] Member with complete information as to any diversion or reconsignment of shipments;

(¶ 23) Members must retain such control over sugar shipped from their refineries as is necessary to prevent the retransiting thereof;

(¶ 24) Members must trace all shipments to ultimate destination;

(¶ 25) Defendants attempt to eliminate the official freight tariffs lending themselves to diversions of shipments;

(¶ 26) Defendants restrict and prevent deliveries to points from which diversions are apt to be made;

(¶ 27) Defendants compel all brokers to search diligently for evidence of diversions and to report to the Institute all such evidence obtained;

(¶ 28) Members are permitted to refund to purchasers, only under certain defined restrictions, the difference between the actual cost of transportation and the recognized freight application, which application is the arbitrary freight charge agreed upon and concertedly adopted by defendants; said restrictions include (a) a requirement that purchasers shall supply affirmative proof, in the form of an unmarked bill of lading and/or otherwise, that they have not diverted or retransited the shipment; and (b) a requirement that no Member shall refund any portion of the trans- [fol. 24] portation charge to any purchaser who has failed to supply such affirmative proof;

(¶ 29) In each instance where an unauthorized diversion of a shipment is discovered Members are required to: (a) set up an appropriate charge on their books against the

purchaser for the collection of the freight application to the ultimate destination, (b) promptly bill the purchaser for the same, (c) thereafter use the same effort to collect such charge as they would to collect other amounts owed them by customers, and (d) report promptly to the Institute all such charges not collected within 30 days from the date of billing, stating all essential details;

(¶ 30) Defendants have blacklisted brokers, warehouses, jobbers, wholesale grocers, and purchasers for participating in any scheme to defeat the freight application concertedly agreed upon by defendants and for refusing or failing to cooperate with the Institute in its program of enforcement herein set forth;

M. (¶ 31) The Institute maintains and distributes to all Members loose-leaf books containing the uniform terms and the freight applications and changes thereof concertedly agreed upon and adopted for the various markets in the United States;

N. (¶ 32) Prior to the formation of the conspiracy herein described the Members shipped to many cities of the United States, and there stored large quantities of sugar [fol. 25] for local delivery in less than carload lots. Said cities will be designated hereinafter as consignment points. Defendants have agreed to abandon, and have concertedly abandoned, a large majority of said consignment points, thereby preventing the shipment of large quantities of sugar into said points, withdrawing from the local markets at said points the stocks of sugar formerly held there, reducing the volume of all sugar there available, depriving many local distributors of their sources of supply, shifting to such distributors the cost of storage, insurance, interest, and other substantial charges, and in many instances actually driving such distributors out of business;

(¶ 33) In like manner defendants have agreed upon and concertedly restricted the number and location of (a) ports of entry, which are points where members may sell at the same prices as in sales to purchasers located at refinery points, (b) reconsignment points, which are points where sugar is stored only for forwarding or local deliveries in carload lots, and (c) reconsignment warehouses;

(¶ 34) The Institute maintains and distributes to all Members loose-leaf books containing complete lists of the

ports of entry, consignment points, reconsignment points, and reconsignment warehouses, and changes thereof, to which lists the Members are restricted;

[fol. 26] (¶ 35) In the process of eliminating consignment points defendants have concertedly and rigidly restricted and regulated the stocks which members were permitted to maintain at such points, and in various instances have specifically authorized the Members to maintain there definitely limited stocks allocated equally among them;

O. (¶ 36) Defendants have agreed to eliminate and have concertedly eliminated shipments of sugar in freight cars with other commodities, and in like manner have fixed the minimum amount of sugar which may be shipped in any such car;

P. (¶ 37) Defendants have agreed not to ship, and have concertedly refused to ship sugar by carriers which have taken any action or permitted any condition tending to defeat any of the objects of the conspiracy;

Q. (¶ 38) The Institute maintains and distributes to the Members loose-leaf books, and insertions representing changes in said books, containing a complete list of warehouses to which the Members are restricted in the storage of sugar; as conditions precedent to q[illegible]ng for said list all warehouse companies are required (a) to execute written agreements to adhere to stipulated rentals and to concede no portion thereof to the customers of the Members, and (b) to establish to the satisfaction of the Institute that they are not affiliated with any brokers, jobbers, or purchasers;

[fol. 27] (¶ 39) Defendants concertedly require warehouse companies, brokers, and others in the sugar trade to open their books and records for the inspection of the detectives and accountants of the Institute;

(¶ 40) Defendants concertedly blacklist, boycott, and agree not to permit dealings with warehouse companies which violate any provisions of the Code, or interfere with any agreements or activities herein alleged, or participate in any activity tending to defeat the purposes of the conspiracy herein described;

(¶ 41) Defendants have arbitrarily and concertedly blacklisted, boycotted, and restricted the use and number of warehouses;

R. (¶ 42) Defendants have agreed to blacklist and boycott and have from time to time concertedly blacklisted and boycotted various sugar brokers, and, in pursuance thereof, the Institute has maintained and distributed to all Members a list of brokers to whom Members are restricted. Members have agreed not to deal with any brokers other than those specified on such authorized list. As a condition precedent to qualifying for said list each broker must solemnly swear that he will rigidly and strictly adhere in every way, in spirit and in fact, to all provisions of the Code; that he will carefully peruse all letters, circulars, and bulletins containing interpretations of the Code; that he will conscientiously uphold the spirit and letter thereof; that he will not participate in giving anything of value [fol. 28] to induce the placing of orders wherever such gift is considered unethical by defendants; that he will not participate in any diversion or retransiting of shipments; that he will diligently inspect and check all shipments consigned to warehouses, for the purpose of detecting and reporting any attempt to deviate from the plan described in this petition; that he will not engage in the business of warehousing, merchandising, or transporting sugar or other products of the refiners; that he will not deal with any associate brokers, sub-brokers, or agents who are not recognized by defendants as legitimate brokers or who have failed to execute an oath similar to that herein described;

S. (¶ 43) Defendants have agreed upon and concertedly adopted uniform contracts of sale containing numerous oppressive and onerous terms, and have concertedly forced all purchasers to execute such contracts and abide by the terms thereof;

T. (¶ 44) Defendants at various times during the existence of the conspiracy herein described have agreed upon and concertedly adopted, as a part of the comprehensive program for enforcement of the Code: the maintenance and operation of an enforcement committee of the Institute; blacklisting of customers; suspension and expulsion of Members; provisions for fines up to $1,000, plus 10% of

the amount involved in any sale held by the Institute to be in violation of the Code; disciplining and discharging em- [fol. 29] ployees of the Members; and disqualifying brokers, jobbers, and warehouse companies. The Institute employs a staff of detectives and accountants to uncover and investigate unauthorized diversions and other violations of the Code. Members are required to open to any person duly qualified by the Institute to investigate, all of their files and records which may be pertinent to any transaction under investigation;

U. (¶ 45) Each Member systematically reports to the Institute each week its production, stocks on hand, stocks in transit, stocks in warehouses, stocks at consignment points, total deliveries, amounts shipped over particular named routes and by particular named carriers, amounts shipped to particular named destinations, amount of each shipment, aggregate volume of shipments, route and destination where delivery is made at other than regular published rates, and statements as to whether the Member or the purchaser requested the particular routes;

(¶ 46) The Institute each week systematically tabulates and distributes to all Members in summary form, the information thus reported together with comparative information as to prior periods and other data;

(¶ 47) The Institute each week systematically reports to the Members the production and deliveries of each and every Member, identifying each of said Members by a letter of the alphabet, and stating the total production and [fol. 30] deliveries of each Member for the week, for the year to date, for the preceding year, each Member's percentage of the grand total for each such period, and its percentage of increase or decrease compared to the preceding year;

V. (¶ 48) Beet sugar refiners, who purchase sugar beets in the United States and manufacture therefrom refined beet sugar, are, in like manner to that of the Members, carrying on interstate and foreign trade and commerce in said refined beet sugar. Prior to the formation of the conspiracy herein described they were, and, but for the conspiracy, still would be actively competing with the Members in said commerce;

(¶ 49) Defendants have induced and/or compelled refiners of beet sugar, to adopt and adhere to many of the restrictive activities herein described. Defendants have induced and/or compelled the refiners of beet sugar to report the prices, terms, conditions of sale, production, shipment, storage, and location of sugar, and other information, all for the purpose of restricting the competitive activities of the beet sugar refiners and compelling adherence to the conspiracy herein described;

(¶ 50) Defendants have concertedly maintained a uniform differential of 20c per hundredweight between the price of cane sugar and that of beet sugar;

W. (¶ 51) Defendants have induced and/or compelled their brokers and others in the sugar trade to abide by the agreements herein described.

[fol. 31]

V

Purpose and Effect

(¶ 52) Defendants have adopted each of the means and devices and engaged in each of the activities aforesaid, with the purpose, intent, and actual effect of unreasonably and unlawfully maintaining enhanced, uniform, and oppressive prices and all elements thereof, and otherwise restraining the aforesaid trade and commerce.

(¶ 53) Defendants through the Institute have actively and effectively restricted their own activities, and likewise dominated and restricted the activities of all others engaged in manufacturing, distributing, transporting, and selling sugar, in their business policies, particularly those policies bearing directly or indirectly on the price structure; and the Institute has accomplished, and is accomplishing, all of the purposes for which it has been created and maintained as hereinbefore described.

(¶ 54) Chiefly as the result of the conspiracy herein described the Members have increased their gross margin of profit (representing the difference between the cost of the delivered raw product, and the refiners' price for the delivered finished product) during the operation of the conspiracy by more than 30%; the consuming public has been required by defendants to pay large sums in excess of what

it would have been required to pay for sugar in a market [fol. 32] free from the artificial restraints herein described; and the growers and producers of raw sugar have received no benefit from the increased prices exacted by defendants.

(¶ 55) The American Sugar Refining Company and The National Sugar Refining Company of New Jersey, during the first year of the Institute's existence, refined a total of approximately 46% of the sugar produced in the United States. The former increased its refining profits during said period from $3,070,851.57 to $8,016,436.72, and the latter enhanced its net earnings from $292,486 to $3,372,986. These increases were in large part the results of the participation of these defendants in the activities herein described.

(¶ 56) Defendants intend to carry on said conspiracy in the manner heretofore described.

VI

Prayer

Wherefore petitioner prays:

(¶ 57) That writs of subpœna issue, directed to each defendant commanding said defendant to appear herein and answer under oath the allegations contained in this petition and to abide by and perform such acts and decrees as the court may make in the premises;

(¶ 58) That the combination, conspiracy, agreements and activities described in this petition be declared to constitute a conspiracy in restraint of interstate and foreign trade and commerce on the part of the defendants, and to [fol. 33] be illegal and in violation of the Act of Congress approved July 2, 1890, known as the Sherman Antitrust Act;

(¶ 59) That defendants be ordered and directed forthwith to dissolve and forever discontinue the Institute;

(¶ 60) That defendants and each of them, and each and all of their respective officers, managers, agents, employees, and all persons acting or claiming to act on behalf of them, or any of them, be perpetually enjoined individually and collectively, from further engaging in, agreeing to per-

form, or in fact performing, said conspiracy or any part thereof, or any other conspiracy of like character or effect, or any of the acts, agreements, understandings, or concert of action described in this petition;

(¶ 61) That the petitioner have such other, further, general, and different relief as the nature of the case may require and the court may deem proper in the premises;

(¶ 62). That the petitioner recover its costs.

George Z. Medalie, United States Attorney for the Southern District of New York. William D. Mitchell, Attorney General. John Lord O'Brian, The Assistant to the Attorney General. James Lawrence Fly, Walter L. Rice, Special Assistants to the Attorney General.

[fol. 34] *Duly sworn to by James Lawrence Fly. Jurat omitted in printing.*

[fols. 35-37] In United States District Court

[Title omitted]

Order Substituting Party Defendant—May 11, 1931.

Upon reading and filing the annexed affidavit of William Leo Mulry, sworn to the 5th day of May, 1931, and the annexed consent of the attorneys for the parties herein dated May 11, 1931, it is, upon motion of Sullivan & Cromwell, attorneys for defendant J. D. & A. B. Spreckels Securities Co. (doing business under the trade name of Western Sugar Refinery),

Ordered that J. D. and A. B. Spreckels Investment Company (doing business under the trade name of Western Sufar Refinery) be substituted as a party defendant herein in the place and stead of J. D. & A. B. Spreckels Securities Co. (doing business under the trade name of Western Sugar Refinery), which is hereby stricken out as a party defendant herein.

Jno. C. Knox, United States District Judge. CW.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed Aug. 1, 1931

Answer of the defendants, The Sugar Institute, Inc., The American Sugar Refining Company; Margaret A. Jamison and Martha A. Jamison, doing business under the firm name and style of Arbuckle Bros.; California & Hawaiian Suagr Refining Corporation, Ltd., Colonial Sugars Co., The Cuban-American Sugar Co., Godchaux Sugars, Inc.; William Henderson, Hunt Henderson, Christian J. Gambel, and Frederick A. Gambel, doing business under the firm name and style of William Henderson (described in the petition as Henderson Sugar Refinery); Imperial Sugar Company, W. J. McCahan Sugar Refining & Molasses Co., The National Sugar Refining Co. of New Jersey, Pennsylvania Sugar Company, Revere Sugar Refinery, Savannah Sugar Refining [fol. 39] Corporation, Texas Sugar Refining Corp.; J. D. & A. B. Spreckels Investment Company, substituted for J. D. & A. B. Spreckels Securities Co. (doing business under the trade name of Western Sugar Refinery); J. F. Abbott, Earl D. Babst, W. Edward Foster, J. P. Cody, M. E. Goetzinger, George M. Rolph, William B. Tyler, C. B. Newman, George E. Keiser, Jacob Moog, I. H. Kempner, Harry G. Thompson, Louis V. Place, Manuel E. Rionda, James H. Post, Charles D. Bruyn, William H. Hoodless, Henry E. Worcester, Benjamin O. Sprague, Thomas Oxnard, Alexander Smith, H. B. Moore, Frank E. Sullivan and Fred G. Taylor.

These defendants, reserving all rights of exception to the petition, for their answer thereto, allege:

I

1. Answering paragraph (1) of the petition, these defendants admit that The Sugar Institute, Inc. (hereinafter called the "Institute"), is a membership corporation organized under the laws of the State of New York and that it has its office at No. 129 Front Street, New York City.

2. Answering paragraph (2) of the petition, these defendants admit that The American Sugar Refining Company is a corporation of the State of New Jersey, and that the location of its principal office is 120 Wall Street, New York, N. Y.; that Margaret A. Jamison and Martha A. Jamison are doing business under the firm name and style of Arbuckle Bros., and that the location of the principal [fol. 40] office of Arbuckle Bros. is 71 Water Street, New York, N. Y.; that California & Hawaiian Sugar Refining Corporation, Ltd., is a corporation of the State of California and that the location of its principal office is 215 Market Street, San Francisco, California; that Colonial Sugars Co. is a corporation of the State of New Jersey and that the location of its principal office is 136 Front Street, New York, N. Y.; that The Cuban-American Sugar Co. is a corporation of the State of New Jersey and that the location of its principal office is 136 Front Street, New York, N. Y.; that Godchaux Sugars, Inc., is a corporation of the State of Ne wYork and that the location of its principal office is 1012 Masonic Temple Building, New Orleans, La.; that William Henderson, Hunt Henderson, Christian J. Gambel and Frederick A. Gambel are doing business under the firm name and style of William Henderson (described in the petition as Henderson Sugar Refinery) and that the location of the principal office of William Henderson is 749 South Peters Street, New Orleans, La.; that Imperial Sugar Company is a corporation of the State of Texas and that the location of its principal office is Sugar Land, Texas; that W. J. McCahan Sugar Refining & Molasses Co. is a corporation of the State of Delaware and that the location of its principal office is 101 South Front Street, Philadelphia, Pa.; that The National Sugar Refining Co. of New Jersey is a corporation of the State of New Jersey and that the location of its principal office is 129 Front Street, New York, N. Y.; that Pennsylvania Sugar Company is a corporation of the State of Pennsylvania and that the location of its principal office [fol. 41] is 1037 North Delaware Avenue, Philadelphia, Pa.; that Revere Sugar Refinery is a corporation of the State of Massachusetts and that the location of its principal office is 333 Medford Street, Boston, Mass.; that Savannah Sugar Refining Corporation is a corporation of the State of New York and that the location of its principal office is Savannah Bank & Trust Co. Building, Savannah,

Georgia; that Spreckels Sugar Corporation is a corporation of the State of Delaware and that the location of its principal office is 82 Wall Street, New York, N. Y.; that Texas Sugar Refining Corp. is a corporation of the State of Delaware and that the location of its principal office is Texas City, Texas; that J. D. & A. B. Spreckels Investment Company (substituted as a defendant for J. D. & A. B. Spreckels Securities Co.), does business under the trade name of Western Sugar Refinery and that the location of its principal office is 2 Pine Street, San Francisco, California; that all of said corporations and concerns are members of the Institute except The Cuban-American Sugar Co. which is not now and has never been a member of the Institute, and Spreckels Sugar Corporation which ceased to be a member of the Institute December 8, 1930.

3. Answering paragraph (3) of the petition, these defendants admit that J. F. Abbott is a director of the Institute, President of The American Sugar Refining Company and a resident of Greenwich, Conn.; that Earl D. Babst is Chairman of the Board of Directors of The American Sugar Refining Company and a resident of New York, N. Y., but deny that he is Honorary President of the Institute; that W. Edward Foster is a Vice-Chairman of [fol. 42] the Board of Directors of The American Sugar Refining Company and a resident of Hackensack, N. J., but deny that he is a director of the Institute; that J. P. Cody is Sales Manager of Arbuckle Bros. and a resident of New York, N. Y.; that M. E. Goetzinger is the Secretary of the Institute, a member of the Board of Directors and of the Executive Committee of the Board of Directors of the Institute, General Manager of Arbuckle Bros. and a resident of New York, N. Y.; that George M. Rolph is President of California & Hawaiian Sugar Refining Corporation, Ltd., and a resident of San Francisco, California, but deny that he is a director of the Institute; that William B. Tyler is a director of the Institute, and assistant secretary of California & Hawaiian Sugar Refining Corporation, Ltd., and a resident of Palo Alto, California; that C. B. Newman is Sales Manager of Colonial Sugars Co. and a resident of East Orange, New Jersey; that George E. Keiser is a director of the Institute, President of Colonial Sugars Co. and a resident of Cannondale, Connecticut; that Jacob Moog is a director and a member of

the Executive Committee of the Board of Directors of the Institute, Senior Vice-President of Godchaux Sugars, Inc., and a resident of New Orleans, Louisiana; that I. H. Kempner is a director of the Institute, President of Imperial Sugar Company and a resident of Sugar Land, Texas; that Harry G. Thompson is Sales Manager of Imperial Sugar Company and a resident of Sugar Land, Texas, but deny that he is a director of the Institute; that Louis V. Place is a director of the Institute, Vice-President of W. J. McCahan Sugar Refining & Molasses Co. and [fol. 43] a resident of Philadelphia, Pa.; that Manuel E. Rionda is Treasurer of the Institute, President of W. J. McCahan Sugar Refining & Molasses Co. and a resident of Alpine, New Jersey; that James H. Post is President of the Institute, President of The National Sugar Refining Co. of New Jersey, Chairman of the Board of Directors of The Cuban-American Sugar Co. and a resident of New York, N. Y., but deny that he is Chairman of the Board of Directors of the Institute; that Charles D. Bruyn is a member of the Executive Committee of the Board of Directors of the Institute, Vice-President of The National Sugar Refining Co. of New Jersey and a resident of Englewood, New Jersey; that William H. Hoodless is Chairman of the Board of Directors and a member of the Executive Committee of the Board of Directors of the Institute, Vice-President of Pennsylvania Sugar Company and a resident of Philadelphia, Pa.; that Henry E. Worcester is a director of the Institute and Vice-President of Revere Sugar Refinery and a resident of Winchester, Massachusetts, but deny that he is Vice-President or a member of Executive Committee of the Board of Directors of the Institute; that Benjamin O. Sprague is President of Savannah Sugar Refining Corporation and a resident of Savannah, Georgia, but deny that he is a director of the Institute; that Thomas Oxnard is a director of the Institute, Vice-President of Savannah Sugar Refining Corporation and a resident of Savannah, Georgia; that Alexander Smith is a director of the Institute, President of Texas Sugar Refining Corp. and a resident of New York, N. Y.; that H. B. Moore is Vice-President and General Manager [fol. 44] of Texas Sugar Refining Corp. and a resident of Texas City, Texas, but deny that he is a director of the Institute; that Frank E. Sullivan is Vice-President and a director of the Institute, Executive Vice-President of J. D.

and A. B. Spreckels Investment Company and a resident of San Francisco, California; that Fred G. Taylor is Executive Vice-Secretary of the Institute and a resident of New York, N. Y. These defendants deny that Rudolph Spreckels, W. W. Harper and Edgar H. Stone are directors of the Institute.

These defendants deny that any of said individuals are active in the management of the Institute except such as are directors or officers thereof. They admit that each of said individuals is a citizen of the State of the United States wherein such defendant has his residence.

4. Answering paragraph (5) of the petition, these defendants admit that the Institute is a trade association in the sugar refining industry; that it was organized and has conducted and now conducts its business and affairs within the Southern District of New York; that some of the members maintain offices for the regular transaction of business within the Southern District of New York, and that they have conducted and are conducting interstate trade and commerce in part within said district. These defendants deny that they entered into the combination or conspiracy described in the petition, or into any combination or conspiracy, within said district or at any place or places in the United States or at any place or places whatsoever. They deny that they have committed any act or acts pursuant to the combination or conspiracy described [fol. 45] in the petition or pursuant to any combination or conspiracy whatsoever, within said district or at any place or places whatsoever.

5. Answering paragraph (6) of the petition, these defendants admit that, with the possibility of some small exceptions, they comprise all of the cane sugar refiners of the United States who are at present engaged in importing raw cane sugar and converting it into refined cane sugar. They deny, however, that they refine 98% of the cane sugar or 85% of all granulated sugar consumed in the United States. They admit that of the cane sugar refined in the United States they refine approximately 98%, but allege that a large amount of refined cane sugar is consumed in the United States which is refined outside of the United States. They allege that while formerly they refined approximately 85% of all granulated sugar con-

sumed in the United States, by reason of said importations of refined cane sugar the percentage of all granulated sugars consumed in the United States which is refined by the members of the Institute has dropped below 85%, and has decreased still further during the present year. They admit that they have produced as much as 5,000,000 short tons of sugar in one year, and admit that the value thereof on recent years has been as much as one-half billion dollars, but allege that the value of their annual production is now considerably below one-half billion dollars.

6. Answering paragraph (7) of the petition, these defendants admit that for many years last past, to and including the date of the filing of the petition herein, they [fol. 46] have maintained refineries in various States of the United States. Specifically their refineries are located as follows: The American Sugar Refining Company, New York, New York, Boston, Massachusetts, Baltimore, Maryland, Philadelphia, Pennsylvania, and Chalmette, Louisiana; Arbuckle Bros., New York, New York; California & Hawaiian Sugar Refining Corporation, Ltd., Crockett, California; Colonial Sugars Co., Gramercy, Louisiana; Godchaux Sugars, Inc., Reserve, Louisiana; William Henderson, New Orleans, Louisiana; Imperial Sugar Company, Sugar Land, Texas; W. J. McCahan Sugar Refining & Molasses Co., Philadelphia, Pennsylvania; The National Sugar Refining Co. of New Jersey, New York, New York, Yonkers, New York, Edgewater, New Jersey; Pennsylvania Sugar Company, Philadelphia, Pennsylvania; Revere Sugar Refinery, Charlestown, Massachusetts; Savannah Sugar Refining Corporation, Savannah, Georgia; Texas Sugar Refining Corp., Texas City, Texas; and Western Sugar Refinery, San Francisco, California. They admit the other allegations in said paragraph (7) contained except that they deny that they have been at any time or now are engaged in any conspiracy whatsoever, and they deny that at any of the times mentioned in the petition they were not in competition. They allege that at all said times they have been and now are in active competition one with another in the trade and commerce described in said paragraph (7) of the petition.

7. Answering paragraph (8) of the petition, these defendants deny that since January 1st, 1928, or at or for [fol. 47] any time prior or subsequent thereto, continu-

ously or otherwise, they have engaged in any combination or conspiracy to restrain, or that, pursuant to any combination or conspiracy or otherwise, they have at any time actually restrained or now are restraining, interstate or foreign trade or commerce in sugar by any means or devices whatsoever, or at all.

8. Answering paragraph A(9) of the petition, these defendants deny that they have created, maintained or utilized the Institute as an instrumentality for promoting or maintaining the conspiracy described in the petition or any conspiracy whatsoever; or for any unlawful purpose or with any unlawful effect whatsoever. They deny that a major part of the activities described in the petition or any unlawful activities have been carried on by these defendants through the Institute or at all, or that said described activities or any unlawful activities have constituted the chief activities of the Institute. They admit that some of the activities described in the petition have been carried on through the Institute, but only to the extent and in the manner and for the purpose and with the effect hereinafter specifically admitted or alleged. They admit that many of the activities described in the petition are entirely outside of the scope of the announced purposes of the organization of the Institute, but deny that any of said activities have been carried on through the Institute or at all by these defendants.

9. Answering paragraph B(10) of the petition, these defendants deny that they have agreed to establish or maintain, or pursuant to any agreement or otherwise have con- [fol. 48] certedly or otherwise established or maintained enhanced or uniform or non-competitive prices; or uniform or non-competitive or onerous or oppressive terms or discounts or conditions or concessions or extra charges; or uniform or artificial or non-competitive transportation charges.

10. Answering paragraph C(11) of the petition, these defendants deny that the defendants who are present members of the Institute agreed upon or concertedly adopted a Code of Ethics, but allege that the original founders, who are not members of the Institute, but some of whom are defendants herein, formulated and recommended on behalf of the Institute a Code of Ethics for the sugar refining

industry, but only for the purpose and with effect, and in the form hereinafter specifically admitted or alleged. These defendants admit that the present members of the Institute adopted amendments to said Code of Ethics, but only as hereinafter specifically admitted or alleged. They admit that the Institute adopted certain Code Interpretations, but only to the extent and with the purpose and effect hereinafter specifically admitted or alleged, and deny that any of the other defendants adopted any such Code Interpretations.

11. (1) Answering paragraph D(12) of the petition, these defendants deny that they have concertedly adopted or maintained a comprehensive system or any system for the exchange of detailed or complete or any information relating to the prices or terms or conditions of current or future sales; (2) or that they have agreed that any prices or terms or conditions of sale shall be reported to the Institute by the members as a condition precedent to any sale [fol. 49] of sugar; (3) or that they have agreed that no member shall deviate from or change such prices or terms or conditions until such member shall have given at least 18 hours notice, or any notice, of such deviation or change, or at all. (4) They deny that the Institute has relayed all such reports by wire to all members, immediately or at all. They admit, as hereinafter more particularly alleged, that some of the defendants report to the Institute price changes, but only after the same have been announced and made public in the manner long established in the trade. They admit that the Institute relays such reports of price changes by wire to such members as request them, but only for the purpose of enabling them to check accurately information already received or available to them from other sources. (5) They deny that they have sold or are now selling all sugar or any sugar under a binding mutual agreement or any agreement to adhere strictly or without deviation or at all to any prices or terms or conditions reported to the Institute, or to maintain such prices or terms or conditions or any prices or terms or conditions until they shall have given at least 18 hours notice or any notice of any proposed change or deviation, or at all.

12. Answering paragraph E(13) of the petition, these defendants deny that they have agreed to abolish, or have concertedly abolished, any discounts or concessions in

prices based upon quantity purchases; but they admit that the Code of Ethics of the Institute, for the reasons more particularly hereinafter alleged, condemns the giving of concessions in price based upon the quantity purchased as an unfair trade practice. These defendants deny that they [fol. 50] have agreed to abolish or have concertedly abolished all of any special terms or conditions or freight charges or advantages or privileges which prior to the formation of the alleged conspiracy were given to customers as an inducement to purchase, or which in a market free from artificial restraints would be given; but these defendants admit that the Code of Ethics of the Institute condemns special services to customers without appropriate charges therefor and variations from openly announced prices and terms unless such special services are given and such variations made openly and without any unfair discrimination between purchasers.

13. (1) Answering paragraph F(14) of the petition, these defendants deny that the members of the Institute have agreed to report or have concertedly reported the location or amount or exact description or any description of, or the reason for selling, damaged sugars or frozen stocks of sugar, as a condition precedent to selling such sugars at a price lower than the respective member's reported price, or as a condition precedent to selling such sugar at any price, or at all, or that they have agreed to make or have concertedly made such reports at all. (2) They deny that the members have agreed to report or have concertedly reported each instance of sale of such sugars, or the date of sale, or the amount sold, or the name or location of the buyer or the selling price or the character of the damage. They admit, however, that the members of the Institute report to the Institute completed sales of damaged sugars and frozen stocks, together with the location [fol. 51] and amount thereof, the sale price and, to some extent, the character of the damage; but they allege that the sole purpose of so reporting to the Institute is to enable the Institute in the interests of such members to answer complaints that such members are unlawfully discriminating in price as between customers. (3) These defendants deny that the Institute receives or disseminates information relating to proposed sales of such sugars; they admit that the Institute disseminates monthly to such mem-

bers as request it, the information furnished to it as to completed sales of such sugars; but only to enable such members to answer the claim of a customer that another member has sold sugar at a lower price than his openly announced price for sugar of that grade. (4) These defendants deny that pursuant to any agreement or understanding or concert of action among the defendants or otherwise the Institute is empowered to restrict or limit or control the sale of damaged sugars or frozen stocks of sugar or of any sugar; and they deny that the Institute has in many instances or in any instances or at all restricted or limited or controlled such sales, or any sale of sugar.

14. Answering paragraph G(15) of the petition, these defendants deny that they have agreed to restrict or limit, or have concertedly restricted or limited the use of certain varieties or any variety of bags or containers used in the packing, delivery or sale of sugar. The defendants admit that the Institute recommended to members that they discontinue the practice of making an allowance to customers for the return of used bags, or for the use of customers' bags, and recommended to members that they discontinue [fol. 52] the use of unbranded bags, for the reason that such practices resulted in discrimination between customers, or were so open to abuse as to be likely to result in and promote such discrimination, and for the reason that such practices were unbusinesslike.

15. Answering paragraph H(16) of the petition, these defendants deny that they have agreed to restrict or limit or prevent, or have concertedly restricted or limited or prevented, the shipment of sugar in pool cargoes by vessels privately chartered by buyers at special rates, or the shipment of sugar in pool cargoes by vessels privately chartered by buyers at any rate, or the shipment of sugar in pool cargoes at all.

16. Answering paragraph I(17) of the petition, these defendants deny that they have exacted any assurance from any broker or jobber or wholesale grocer or corporation engaged in selling sugar or from any person or firm engaged in selling sugar that such broker or jobber or wholesale grocer or corporation or person or firm will adhere to or maintain any price or term or condition or freight charge agreed upon by defendants or any price or term or condi-

tion or freight charge whatsoever; and these defendants deny that in many instances or in any instance or at all the Institute has threatened to blacklist or has blacklisted or has employed other coercive devices or any device against any broker or jobber or wholesale grocer or any person or firm or corporation engaged in selling sugar; except that these defendants admit that the Institute, for the reasons hereinafter more particularly alleged, recommended to [fol. 53] members that they require brokers in the sale of sugar that such brokers refrain from trade practices condemned as unethical by the Code of Ethics of the Institute.

17. Answering paragraph J(18) of the petition, these defendants deny that they have during a major portion of the period covered by the petition, or for or at any time or at all, operated under agreements or under any agreement that they will not pay any part of the freight charges; or that whenever any member does pay any portion of any freight charges, said member will notify the Institute or explain the reason therefor. These defendants admit, however, that the Institute at one time recommended to members that if the amount of sugar shipped to a market by a customer over a differential route at his own cost for such slower service and at his risk of the market for such transit period was inconsiderable, it should not be allowed to reduce the freight application paid on the preponderating volume of sugar moving to such market, for the reason that the resulting increased freight absorption by the refiners would increase the burden on customers in other markets, and would be unfairly discriminatory against customers in such markets.

18. Answering paragraph K(19) of the petition, these defendants deny that they have agreed that they will not sponsor or encourage or allow any commercial practice on the part of any purchaser or broker or jobber or warehouse company or wholesale grocer which tends to lower or vary the price or prices at which any sugar is sold by any refiner or wholesale jobber, or at all.

[fol. 54] 19. Answering paragraph L(20) of the petition, these defendants admit that members' refineries are located in the States of New York, Massachusetts, New Jersey, Pennsylvania, Maryland, Georgia, Louisiana, Texas and California, and that shipments are made from said refin-

eries to points in other states by rail and/or water. These defendants deny that freight charges have always constituted, or that they do now constitute, a part of the cost of sugar to the customers of the members of the Institute, but they allege that such charges constitute a separate charge paid for the service of transportation. They deny that before the formation of the Institute, or of the alleged conspiracy described in the petition, or at any time, freight charges were the subject of competition among members of the Institute, but admit that a portion of such charges was absorbed by the members prior to the formation of the Institute, and allege that such absorption of freight charges for the benefit of customers still continues, and is a subject of competition between members; they deny that purchasers have ever exercised an unrestrained choice of points at which to take delivery of sugar, but allege that they have at all times since the organization of the Institute exercised, and do now exercise the same freedom of choice as before the organization of the Institute; they admit that in many instances customers purchased, and allege that they do now still purchase to the same extent as before the organization of the Institute, sugar f. o. b. refinery or f. o. b. intermediate points from which they transited or transit, or retransited or retransit, to points of ultimate destination. These defendants deny that pur-
[fol. 55] chasers have ever exercised an unrestrained choice of available transportation rates, means and routes, but allege that they have at all times since the organization of the Institute exercised, and do now exercise the same freedom of choice as before the organization of the Institute. These defendants deny that they have agreed upon or concertedly adopted a comprehensive plan or any plan for maintaining arbitrary or uniform freight charges. They deny that pursuant to any plan they have restricted or prevented the choice by purchasers of points of delivery or of rates or means or routes of transportation as set forth in the petition or otherwise. They deny that they have prevented in many instances or any instance or at all any sale or shipment as set forth in the petition or otherwise. They deny that they have agreed upon or concertedly advocated or adopted or required any of the acts or things set forth in paragraphs 21-30, inclusive, of the petition, to wit:

20. Answering paragraph (21) of the petition, these defendants deny that they have agreed upon or concertedly advocated or adopted or required that purchasers must specify at the time of entering their orders the destination of the sugar so ordered or that purchasers must not deviate from such specifications or any specification. These defendants, however, allege that the Institute recommended to its members, in order to prevent unlawful and unfair discrimination, that, if a refiner had different prices and terms in the same or different territory, the buyer should be required to elect and specify at the time of the order the price and terms desired and that delivery should be [fol. 56] made only in the territory to which the price and terms so elected and specified applied at the time of the order; and the Institute recommended to its members, in order to prevent unlawful and unfair discrimination, and to prevent breaches of contract and frauds upon the refiner, that, if the purchaser was found to have diverted or retransited the sugar into a territory in which the refiner absorbed less freight than in the territory specified in the order, the refiner should require the purchaser to pay the freight according to the refiner's ruling freight basis to such territory.

21. Answering paragraph (22) of the petition, these defendants deny that they have agreed upon or concertedly advocated or adopted or required that purchasers or any purchaser must sign any contract containing a provision that carriers may furnish the member with information as to any diversion or reconsignment of shipments. These defendants, however, allege that the Institute recommended to its members that they include in their contracts a provision whereby the purchaser would authorize the carrier of the sugar to furnish the refiner shipping sugar with information concerning a diversion or reconsignment of such sugar which would enable the refiner to discover diversions or reconsignments amounting to a breach of contract or fraud upon the refiner and to an unfair and unlawful discrimination in favor of the purchaser and against other customers of the refiner; but these defendants allege that the members of the Institute have not generally adopted such recommendation.

[fol. 57] 22. Answering paragraph (23) of the petition, these defendants deny that they have agreed upon or con-

certedly advocated or adopted or required that members must retain such control over sugar shipped from their refineries as is necessary to prevent the retransiting thereof, or any control over such sugar. They allege, however, that the Institute recommended to members that they retain over sugar shipped from their refineries such control as should enable them to prevent unlawful and fraudulent diversions or retransiting thereof, which in themselves would constitute a breach of contract or fraud upon the refiner and make him unwittingly a party to an unfair and unlawful discrimination in favor of the purchaser and against other customers of the refiner, or subject him to complaints of such unfair and unlawful discrimination.

23. Answering paragraph (24) of the petition, these defendants deny that they have agreed upon or concertedly advocated or adopted or required that members must trace all or any shipments to ultimate destination. They admit, however, that the Institute recommended to members that they should trace their shipments to ultimate destination, where necessary in order to detect fraudulent and unlawful diversions or retransiting; and for the purpose of enabling them to enforce their contracts so as to prevent unfair and unlawful discriminations between customers, or unjust charges or complaints against them of being a party to such unfair and unlawful discrimination.

24. Answering paragraph (25) of the petition, these defendants deny that they have agreed or arranged in con- [fol. 58] cert to eliminate, or that they have attempted or are attempting in any way to eliminate, any official freight tariffs lending themselves to diversions of shipments; but these defendants allege that a committee was appointed by the Institute to consider with the carriers, subject to the approval of the Interstate Commerce Commission, as by law in such cases made and provided, certain changes in the rules and tariffs of the carriers, so as to prevent misinterpretations of such rules and tariffs and unfair and unlawful retransiting and diversion; and that said amendments or new rules and tariffs, with the reasons therefor, are now befor- the Interstate Commerce Commission for approval.

25. Answering paragraph (26) of the petition, these defendants deny that they have agreed to restrict or prevent,

or have concertedly advocated or adopted or required the restriction or prevention of, or that they have restricted or prevented or are restricting or preventing in any way, deliveries or any delivery to points from which diversions are apt to be made. These defendants admit, however, that in one instance a committee of members, self-appointed to investigate in a certain territory a flagrant abuse of the privilege of retransiting and diversion therein, amounting to an unfair discrimination between customers and a fraud upon the refiners, recommended to certain refiners serving said territory that they consign stock in or near said territory to prevent the continuanec of such abuse and to put an end to such discrimination and such frauds.

[fol. 59] 26. Answering paragraph (27) of the petition, these defendants deny that they have agreed to compel or have concertedly advocated or required the compelling of, or that they have compelled or are compelling in any way all brokers or any broker to search diligently or otherwise for evidence of diversions or to report to the Institute all or any such evidence obtained, except that these defendants admit, as hereinafter more particularly alleged, that the Institute recommended to its members that they require of brokers who act for them in the sale of sugar, to agree, and the members do require of brokers that they agree, to report to them any unauthorized diversion or retransiting of the sugar sold through such broker, when such diversion or retransiting amounts to an unfair or unlawful discrimination between the customers of such members or a fraud upon such members.

27. Answering paragraph (28) of the petition, these defendants deny that they have agreed or concertedly advocated or adopted or required as a condition of members, or any member, refunding to any purchaser the difference between the actual cost of transportation and any alleged recognized freight application, that the purchaser shall supply proof that he has not diverted or retransited the shipment; or that no member shall refund any portion of the transportation charge to any purchaser who has failed to supply such proof. These defendants allege, however, that the Insfitute recommends to its members that they do not refund to a purchaser any part of the transportation paid by such purchaser except upon sufficient proof that the purchaser is entitled to such refund (all of which proof

[fol. 60] is in hand to the purchaser making an honest claim of refund), for the reason that if such member pays a fraudulent claim of refund to any purchaser he thereby becomes inadvertently a party to an unfair and unlawful discrimination in favor of such purchaser and against other customers of such member, or becomes liable to the charge of being a party to such unfair and unlawful discrimination.

28. Answering paragraph (29) of the petition, these defendants deny that they have agreed or concertedly advocated or adopted or required that where an unauthorized diversion of a shipment is discovered, the members shall be required to set up any charge against the purchaser for any freight application, or to bill the purchaser for the same, or to use any effort to collect such charge, or to report to the Institute any such charge. These defendants, however, allege that the Institute has recommended to its members that upon discovery by them of an unauthorized diversion or retransiting of sugar which has amounted to a fraud upon the refiner and an unfair and unlawful discrimination in favor of such purchaser and against other customers of the refiner, such refiner should (1) set up an appropriate charge on his books for the amount of the refund or freight allowance unlawfully exacted from the refiner; (2) bill the purchaser for the sum promptly; (3) thereafter use the same effort to collect the same as he would to collect other amounts owed him by customers; and (4) report promptly to the Institute all such charges not collected within thirty days from the date of billing, stating [fol. 61] all essential details, such report to the Institute being for the credit files which it maintains for the use and information of members lawfully entitled thereto.

29. Answering paragraph (30) of the petition, these defendants deny that they have blacklisted any broker or warehouse or jobber or wholesale grocer or purchaser for participating in any scheme to defeat any alleged freight application concertedly agreed upon by defendants or any freight application whatever, or for refusing or failing to cooperate with the Institute in the alleged program of enforcement set forth in the petition, or for any other reason.

30. Answering paragraph M(31) of the petition, these defendants deny that the Institute maintains or distributes to all members or any members any loose-leaf or other book

or books containing any uniform terms or freight applications concertedly agreed upon or adopted, or any changes agreed upon or adopted therein, for the various markets or any market in the United States. They allege, however, that the Institute compiles for the use of members and circulates to such of them as request it a compilation of the publicly announced freight selling bases of members of the Institute in all markets in which they sell their sugar; but for no other purpose than as a convenient compilation for members of information which they already have, and which, by jointly sharing the expense of such compilation, they can have more economically arranged for them by the statisticians of the Institute.

[fol. 62] 31. Answering paragraph N(32) of the petition, these defendants admit that prior to the formation of the Institute the members shipped, and allege that they do still ship, to many cities of the United States, called consignment points, sugar consigned to their own order, and there stored, and do now store, such sugar for local delivery in less than carload lots. These defendants deny that they have agreed to abandon or have concertedly abandoned, or have prevented the shipment of sugar into, or have withdrawn from the local markets any stock or stocks of sugar formerly held at, a majority of such points. They deny that at any consignment point they have reduced the volume of sugar available, or deprived any local distributor of his source of supply or have shifted to any such distributor the cost of storage or insurance or interest or other charges, or have driven any such distributor out of business. They admit that at one time the Institute, for the purpose of effecting lawful economies in the industry, and without expense or serious inconvenience to the trade, suggested the advisability of decreasing the number of such so-called consignment points by the abandonment of such as were unnecessary because of their immediate proximity to detention points or markets served by the same refiners. The suggestion of the Institute, however, while it eliminated some unnecessary consignment points, did not have the effect of reducing the number of such points, for the members of the Institute are now consigning sugar to more points than at the time the Institute was founded.

[fol. 63] 32. Answering paragraph (33) of the petition these defendants, except as hereinbefore or hereinafter al-

leged, deny that they have agreed upon or concertedly restricted the number or location of ports of entry, described in the petition as points at which members sell at the same prices as in sales to purchasers located at refinery points, or reconsignment points, which are described in the petition as points where sugar is stored for forwarding or local deliveries in carload lots, or reconsignment warehouses.

33. Answering paragraph (34) of the petition, these defendants deny that the Institute maintains or distributes to all members or any members any loose-leaf or other book or books containing any list of ports of entry, or consignment points, or reconsignment points, or reconsignment warehouses, or changes thereof, to which the members are restricted. These defendants allege, however, that the Institute compiles for the use of members and gives to such of them as request it certain information as to the location of ports of entry, which are no more than ports at which under the Customs Laws and Regulations of the United States Government foreign refined sugar can and does enter the United States; and information as to points at which members are at the time consigning sugar; and information as to so-called reconsignment points, which are no more than storage-in-transit points as fixed by the rules of the carriers under regulations of the Interstate Commerce Commission and which are in use as such by any of the refiners at the time; and information as to warehouses at such [fol. 64)] storage-in-transit points which are being used by members of the Institute; but these defendants specifically deny that the members are restricted to the use of any such ports of entry, consignment points, storage-in-transit points or warehouses at storage-in-transit points.

34. Answering paragraph (35) of the petition, these defendants deny that they have concertedly restricted or regulated any stocks maintained by any member at any consignment point or that any member has been permitted to maintain, or restricted in maintaining, any stock at any such point. They deny that they have authorized the members or any member to maintain at any point any limited stock, or that they have allocated the stock to be maintained at any point among the members or among any members. They admit, however, that in the abandonment of any consignment point pursuant to the early efforts of the Insti-

tute hereinbefore mentioned, the Institute recommended to the refiners withdrawing from such consignment point that they equalize stocks at such point for the purpose of maintaining competition thereat and to prevent any refiner whose stocks exceeded those of other refiners from obtaining a monopoly of the trade at such point.

35. Answering paragraph O(36) of the petition, these defendants deny that they have agreed to eliminate or have concertedly eliminated all or any shipments of sugar in freight cars with other commodities, or have fixed the minimum amount of sugar which may be shipped in any such car.

36. Answering paragraph P(37) of the petition, these [fol. 65] defendants deny that they have agreed not to ship or have concertedly refused to ship sugar by any carrier which has taken any action or permitted any condition tending to defeat any of the objects of the alleged conspiracy described in the petition or by any carrier whatever. They admit, however, that the Institute in its effort to eliminate unfair and unlawful discrimination between customers has recommended to refiners that they do not ship by barge and steamship lines which do not publish their tariffs, or which give rebates in carrying charges to any purchaser of sugar, thereby becoming a party to an unfair and unlawful discrimination in favor of such purchaser and against other customers of the refiner; and recommended to refiners that they do not employ trucking companies which are affiliated with buyers, brokers or warehouses of sugar.

37. Answering paragraph Q(38) of the petition, these defendants deny that they maintain or distribute to the members or any members any looseleaf or other book or books, or insertions representing changes in such book or books, containing a list of warehouses to which members are restricted in the storage of sugar. They deny that as conditions precedent to qualifying for any such list, or for any purpose whatever, they concertedly require warehouse companies to execute written agreements to adhere to stipulated rentals or to concede no portion thereof to the customers of the members or to establish to the satisfaction of the Institute that they are not affiliated with any broker, jobber or purchaser. These defendants admit, however,

that the Institute recommended to members that they ob-
[fol. 66] tain from warehouses, and that many if not all members do obtain from warehouses, before storing sugar in them, an agreement that the warehouse will not split with customers of the refiner the storage charges paid by the refiner to the warehouse. These defendants allege that the Institute compiles and distributes to members information in loose-leaf form as to warehouses at various points of the United States which are being used by members, and which in the opinion of the member so using them are conducted in such manner that storage of sugar therein conforms to the practices recommended in the Code of Ethics of the Institute, in that such warehouse does not engage in fraudulent practices against refiners, such as permitting customers to withdraw sugar without reporting to the refiner, continuing to charge the refiner storage on such sugar after it has been withdrawn and splitting warehouse charges with customers; and which warehouses are regular in making their reports to refiners, and are not owned or operated by or so closely affiliated with brokers or customers as to be interested in commissions paid for brokerage, or in the ownership of sugar on which storage charges may operate as a reduction in the price of sugar amounting to an unfair and unlawful discrimination in favor of the customer.

38. Answering paragraph (39) of the petition, these defendants deny that they concertedly require any warehouse companies or brokers or others in the sugar trade to open their books or records for the inspection of the detectives or accountants of the Institute. They allege, however, that where warehouse companies or brokers have been sus-
[fol. 67] pected of being parties to frauds upon refiners or of other violations of law, members through the Institute request information concerning such specific transactions, and where the truth of such information is doubted request that investigators of the Institute be permitted to inspect with regard to such transactions the books and records disclosing them.

39. Answering paragraph (40) of the petition, these defendants deny that they concertedly blacklist, or boycott, or agree not to permit dealings with, any warehouse company which violates any of the provisions of the Code, or

interferes with any of the agreements or activities alleged in the petition, or participates in any activity tending to defeat the purposes of the alleged conspiracy described in the petition. They deny that they concertedly blacklist or boycott, or agree not to permit any dealings with, any warehouse for any reason whatever.

40. Answering Paragraph (41) of the petition, these defendants deny that they have arbitrarily or concertedly or otherwise blacklisted or boycotted or restricted the use or number of warehouses. They allege, however that the Code of Ethics of the Institute recommends that members do not store sugar in warehouses in which brokers or customers are interested or with which they are in any way affiliated, for the reason that the practice of so storing inevitably leads to perpetration of widespread frauds upon the refiners, which in and of themselves amount to unfair and unlawful discriminations as between purchasers of sugar.

[fol. 68] 41. Answering paragraph R(42) of the petition, these defendants deny that they have agreed to blacklist or boycott, and deny that they have from time to time or at any time or at all concertedly blacklisted or boycotted any sugar broker and deny that in pursuance of any such agreement or otherwise the Institute has maintained or distributed to all members or any members any list of brokers to whom members are restricted. They deny that members have agreed not to deal with any brokers other than those specified on such alleged list or with any broker at all. They deny that as a condition precedent to qualifying for such alleged list or at all any broker is required to swear that he will adhere to the provisions of the Code, or that he will peruse all letters or circulars or bulletins containing interpretations of the Code, or that he will uphold the spirit and letter thereof, or that he will not participate in giving anything of value to induce the placing of orders wherever such gift is considered unethical by the defendants, or that he will not participate in any diversion or retransferring of shipments, or that he will inspect or check all shipments consigned to warehouses for the purpose of detecting and reporting any attempt to deviate from the plan described in the petition, or that he will not engage in the business of warehousing, merchandising or transporting sugar or other products of the refiners; or that he will

not deal with any associated brokers, sub-brokers or agents who are not recognized by the defendants as legitimate brokers or who have failed to execute an oath similar to that described in the petition. These defendants, however, [fol. 69] allege that the Institute recommended to its members, largely at the instance and request of the brokers themselves, in order to eliminate unfair, unethical and frequently unlawful discrimination between customers, that members do not employ in the sale of their sugar brokers who will not pledge themselves and agree that in such sale they will observe the provisions of the Code of Ethics; that they will not split their commissions with customers; that they will not give secret inducements to customers for the placing of orders; that they will not abet unfair, unlawful or fraudulent diversions or restransiting of sugars, but will report instances thereof which come to their notice; that they will render service to the refiner to check the refiner's stock in warehouses at consigned points; that they will not abet the fraudulent collection from the refiner of unearned warehouse charges, but will report to the refiner instances thereof which may come to their attention; that they will not, while continuing as brokers, have any financial interest in the warehousing, merchandising or transporting of the refiner's sugar; that they will not employ others in the sale of sugar who will not in turn enter into the same pledge and agreement as to the conduct of their sales as the agent of the broker. These defendants allege that the Institute compiles and distributes to members information in loose-leaf form, giving the names of brokers who are currently being used by members, but members are not in any way restricted to such list in the employment of brokers.

42. Answering paragraph S(43) of the petition, these defendants deny that they have agreed upon or concertedly [fol. 70] adopted any uniform contract of sale containing oppressive or onerous terms or any uniform contract of sale at all, and deny that they have concertedly forced all purchasers or any purchaser to execute any such contract or any contract or abide by the terms thereof.

43. Answering paragraph T(44) of the petition, these defendants deny that at various times during the existence of the alleged conspiracy described in the petition or at any time or at all they have agreed upon or concertedly adopted any program for the enforcement of the Code of Ethics, or

that as a part of any such program or otherwise there has been maintained or operated any enforcement committee of the Institute except as hereinafter more specifically alleged, or that as a part of such enforcement program or otherwise they have agreed upon the blacklisting of customers or have blacklisted any customer or customers. They deny that they have provided for the suspension or expulsion of members or for fines for violation of the Code of Ethics except as hereinafter more specifically alleged. They deny that they have as a part of any enforcement program or otherwise agreed upon or provided for the disciplining or discharging of any employees of the members, or this disqualification of any brokers or jobbers or warehouse companies. They allege, however, that for some time there was a standing committee appointed by the Board of Directors of the Institute known as the Enforcement Committee, whose duty it was to examine into complaints of non-observance of the Code of Ethics of the Institute. They ad- [fol. 71] mit that the Institute like any other membership corporation has the power of expelling members. They allege that at one time a resolution was tentatively adopted by the Board of Directors of the Institute, containing a provision for fines upon members not exceeding $1,000, and in the case of a sale of sugar found to have been made under circumstances at variance with the provisions of the Code of Ethics, an additional fine not exceeding 10% of such sale; but they allege that the resolution failed to meet with the approval of the members, and the Board of Directors of the Institute, upon learning further that the United States Government objected to a provision of such character, rescinded its resolution, and said provision never was or has been, and is not now in force and effect. The defendants admit that the Institute employs accountants to investigate frauds upon members, and unfair or unlawful discriminations between purchasers of sugar, whether or not the unlawful discrimination or the fraud upon the member occurred through unauthorized diversions of sugars or through other nonobservations of the Code of Ethics of the Institute. The defendants deny that members are required to open to any person duly qualified by the Institute to investigate or to any person at all, all of their files or records which may be pertinent to any transaction under investigation or any files or records, but allege that all of the members voluntarily agreed so to open their files and records

and have done so when requested by the Institute for the purpose of investigating frauds upon members or unfair or unlawful discrimination between customers.

[fol. 72] 44. Answering paragraph U (45) of the petition, these defendants admit that each member of the Institute reports to the Institute each week its production during the week, its total stocks on hand at the refinery at the end of the week, its total stocks at consignment points at the end of the week, its total stocks stored in transit at the end of the week, total deliveries for the week, total amounts shipped during the week over certain named differential routes (but only accidentally or incidentally by particular named carriers) to particular named destinations, and distinguishing such shipments between those shipped for refiner's own account and those shipped by such routes at customer's request; shipments during the week by certain named barge routes some of which do not publish their rates, giving the amount and destination of each shipment, and distinguishing shipments on consignment for refiner's own account and shipments at customer's request. The defendants deny that members report each week, or at all, stocks in warehouses except as hereinabove mentioned, or amounts of particular shipments except as hereinabove mentioned.

45. Answering paragraph (46) of the petition, these defendants admit that the Institute each week makes certain tabulations in summary form of the information reported to it and distributes such tabulations weekly to the members and that certain of these tabulations contain comparative information as to prior periods.

46. Answering paragraph (47) of the petition, these defendants admit that the Institute each week reports to the [fol. 73] members tabulations showing the total production and deliveries of each member, identifying each of said members by a letter of the alphabet, and stating the total production and deliveries of each member for the week, for the year to date, for the preceding year, each member's percentage of the grand total for each of such periods and its percentage of increase or decrease compared to the preceding year.

47. Answering paragraph V (48) of the petition, these defendants admit that the beet sugar manufacturers who

purchase sugar beets in the United States and manufacture therefrom refined beet sugar are, in like manner to that of the members of the Institute, engaged in carrying on interstate and foreign trade and commerce in said beet sugar. These defendants admit that prior to the times mentioned in the petition said beet sugar manufacturers were actively competing with the members of the Institute in said commerce; they deny that said competition has at any time ceased, or been in any way interfered with by these defendants by or since the formation of the Institute or otherwise, and allege that said competition is in all respects as keen and active as before the formation of the Institute.

48. Answering paragraph (49) of the petition, these defendants deny that they have induced or compelled the manufacturers of beet sugar to adopt any of the restrictive activities described in the petition, or any restrictive activities whatsoever, or to report the prices or terms or conditions of sale or production or shipment or storage or location of sugar, or any other information for the purpose of [fol. 74] restricting competition or for any other purpose, or that they have done any act or thing for the purpose of restricting any competitive activities of the beet sugar manufacturers or compelling adherence to the alleged conspiracy described in the petition, or to any conspiracy or combination whatever. These defendants are informed and allege that the beet sugar manufacturers of the United States are organized into a trade association similar to The Sugar Institute, Inc., known as the Domestic Sugar Bureau; that the Domestic Sugar Bureau like The Sugar Institute, Inc., is a membership corporation; that it has by invitation since its organization taken into membership some manufacturers of cane sugar, including one refiner who subsequently also became and still is a member of The Sugar Institute, Inc.; that before it was formed its founders and organizers conferred with the office of the Attorney General of the United States and fully and explicitly advised him of their purposes and intentions in organizing it; that with the knowledge and approval of the office of the Attorney General of the United States the Domestic Sugar Bureau adopted a Code of Ethics substantially identical with the Code of Ethics of The Sugar Institute, Inc. These defendants allege that said Domestic Sugar Bureau was voluntarily organized by the beet sugar manufacturers without any in-

ducement, procurement or suggestion on the part of the defendants herein; and that while said Domestic Sugar Bureau has conducted its business and affairs as a trade association of sugar manufacturers along somewhat parallel lines and in many important respects similar to The Sugar Institute, Inc., it has done so without any procure-[fol. 75] ment, suggestion or influence from The Sugar Institute, Inc. whatsoever. These defendants allege on information and belief that the Domestic Sugar Bureau has at all times since its organization kept the office of the Attorney General of the United States fully advised of all its activities and that no complaint whatsoever has ever been made of any of said activities by the plaintiff herein or by the Attorney General of the United States except for the allegations now contained in said Paragraph 49 of the petition herein.

49. Answering paragraph (50) of the petition, these defendants deny that they have concertedly maintained a uniform differential of twenty cents per hundredweight or any differential of any amount, uniform or otherwise, between the price of cane sugar and that of beet sugar.

50. Answering paragraph W (51) of the petition, these defendants deny that they have induced or compelled any brokers or any others in the sugar trade to abide by the agreements described in the petition or by any agreements. They allege, however, that the members of the Institute require brokers, who act for them in the sale of their sugar, to enter into the agreement hereinabove described, for the purpose of maintaining the standards of business ethics prescribed in the Code of Ethics of The Sugar Institute, Inc.

51. Answering paragraph (52) of the petition, these defendants deny that they have adopted any of the means or [fol. 76] devices, and deny that they have engaged in any of the activities, set forth in the petition except in the manner and for the purpose and with the effect hereinbefore specifically admitted in this answer, and they deny that they have done any act or thing whatsoever with the purpose or intent or effect of maintaining enhanced or uniform or oppressive prices or the elements thereof, or of otherwise or in any way restraining interstate trade and commerce.

52. Answering paragraph (53) of the petition, these defendants deny that through the Institute or otherwise they have restricted their own activities except in the manner and for the purpose and with the effect hereinbefore specifically admitted in this answer, and deny that they have in any way dominated or restricted the activities of all or any others engaged in manufacturing or distributing or transporting or selling sugar in respect of any of their business policies, either those which bear directly or indirectly on the price structure or other policies, except in the manner and to the extent and for the purpose and with the effect specifically admitted in this answer. They deny that the Institute has accomplished or is accomplishing any restraint of interstate trade and commerce or any other unlawful purpose or effect whatsoever.

53. Answering paragraph (54) of the petition, these defendants deny that as a result of the conspiracy described in the petition or otherwise they have increased their gross margin of profit since the establishment of the Institute or during the period referred to in the petition by thirty [fol. 77] per cent. (30%); they deny that the consuming public has been required by the defendants to pay large sums or any sums in excess of what it would have been required to pay for sugar in the absence of the operation of the Institute or of the activities admitted in this answer, and they deny that they have exacted any increased prices in which any growers or producers of raw sugar or any others could share, or any increased prices whatever.

54. Answering paragraph (55) of the petition, these defendants admit that The American Sugar Refining Company and The National Sugar Refining Co. of New Jersey, during the first year of the Institute's existence refined a total of approximately 46% of the refined cane sugar produced in the United States. They admit that The American Sugar Refining Company during said period increased its refining profits from $3,070,851.57 to $8,016,436.72, and that The National Sugar Refining Company of New Jersey enhanced its net earnings from $292,486.00 to $3,372,986.00, but deny that such increases were in large part the results of the participation of said companies in the activities described in the petition.

55. Answering paragraph (56) of the petition, these defendants and each and every of them deny that they have

ever carried on or are now carrying on or intend to carry on the conspiracy described in the petition or any conspiracy or any unlawful acts or conduct whatever.

[fol. 78] II

For a further and separate defense to the allegations contained in the petition, these defendants allege:

56. The American Sugar Refining Company, Arbuckle Bros., California & Hawaiian Sugar Refining Corporation, Ltd., Colonial Sugars Company, Godchaux Sugars, Inc., William Henderson, Imperial Sugar Company, W. J. McCahan Sugar Refining & Molasses Co., The National Sugar Refining Co. of New Jersey, Pennsylvania Sugar Company, Revere Sugar Refinery, Savannah Sugar Refining Corporation, Spreckels Sugar Corp., Texas Sugar Refining Corp. and Western Sugar Refinery, with exceptions of no importance for the purposes of this answer, own and operate all of the sugar refineries in the United States at which raw cane sugar imported into the continental United States is converted into refined cane sugar. They will hereinafter sometimes be referred to as the "refiners", and refined cane sugar will be hereinafter referred to as "refined sugar". Raw cane sugar is manufactured from sugar cane, and is imported into the continental United States largely, if not almost entirely at the present time, from Cuba, Porto Rico, Hawaii and the Philippine Islands. Until very recently the refiners above named manufactured and sold approximately 83 per cent. of all the sugar consumed in the United States. Of the remaining approximately 17 per cent., approximately 1 per cent was manufactured from sugar cane grown in some of the southern States of the [fol. 79] United States, and approximately 16 per cent., known as beet sugar, was manufactured from sugar beets in a number of the central and western States of the United States.

57. During the years in which the United States was engaged in the European war and for several years thereafter, the demand for refined sugar made upon the refineries of the United States exceeded their capacity. During a part of said time the operation of said refineries and the sale and

distribution of their product was under the direction and control of the United States Government. To meet the demand upon the refineries, and at the urgent solicitation of the United States Government, many of the refiners increased the capacity of their refineries. Thereafter, with the increase in the production of beet sugar in Europe, foreign demand for refined cane sugar manufactured in the United States decreased and almost entirely ceased. By reason thereof the capacity of the refineries of the United States became and still is fifty per cent in excess of the consumption of their product.

58. Through improvements made in the process of refining raw cane sugar in recent years, refined sugar has become to a large extent a standardized and staple product. In appearance beet sugar of high quality is not distinguishable from refined sugar of high quality, and with similar improvements made in the process of manufacturing beet sugar, practically all of the beet sugar manufactured in the United States can and does successfully compete with refined sugar when quoted at a discount of ten to twenty [fol. 80] cents per hundred pounds less than refined sugar. Such differential in quoted price is historic in the sugar trade in the United States, and is not the result of any combination or conspiracy on the part of the refiners of the United States. That such differential is historic was found by the United States Tariff Commission in its official survey of sugar and other articles in Paragraph 177 of the Tariff Act of 1913, as reported to the Congress in 1921.

59. For several years prior to January 1, 1928, largely by reason of their increasing inability to run their refineries at more than two-thirds their capacity as hereinbefore mentioned with the consequent increased overhead cost per pound of sugar manufactured and other increased costs incident to producing much less than capacity, there was created a situation in which there was opportunity for buyers of sugar, and especially for favored buyers, to obtain from the refiners of the United States concessions in price and terms and other discriminatory advantages over other buyers and especially small buyers of sugar.

These discriminations, while they were not limited to, included the following:

(1) Discounts or rebates from the open and publicly announced prices of the refiners, sometimes with the under-

standing that such discounts or rebates would not be given to competitors of the purchaser;

(2) Payment to the purchaser of some part or all of the brokerage customarily paid by the refiner to his brokers for services rendered in the sale of the sugar;

[fol. 81] (3) Storage of sugar on the premises of the purchaser, or on premises or with storage companies in which the purchaser had a substantial financial interest or over which he exercised control; thereby giving the purchaser the advantages of (a) storage charges or an interest therein which reduced the net cost of his sugar; (b) relief from the necessity of keeping any capital invested in sugar; (c) a practical and exclusive option on all of the sugar so stored in event of a rise in price; (d) relief from all market risk in event of a lowering of price;

(4) Advertising with the purchaser or with papers, magazines or other publications in which the purchaser had a financial interest, or from which he received a commission, or a discount or rebate on his own advertising, or a split with the publisher of the amount paid by the refiner for advertising;

(5) Substitution for the grades and packings appearing on the order, but at the same price, of more expensive grades and packings, or grades and packings which commanded a higher retail price;

(6) Delayed billing beyond the customary credit terms of the refiner and the terms of the purchaser's own contract, so as to give the purchaser better credit terms than those received by his competitors and better than those openly held out by the refiner as applicable to all customers of the refiner;

[fol. 82] (7) Granting full discounts in case of delayed payments, when such discounts according to the open and publicly announced terms of the refiner were applicable only to cash payments made strictly within the terms of the contract;

(8) Split billings to the purchaser for a carload of sugar, with extended payment terms for part of such carload, thus giving the purchaser a discriminatory advantage over his

competitors who bought in carload lots on the open and publicly announced price and terms of the refiner;

(9) Performance at the refiner's expense of special services for the purchaser for which the purchaser did not pay, thereby giving the purchaser a discriminatory advantage over his competitors who did not receive such services;

(10) Delivery of stocks out of consignment, charging only the minimum freight rate over the least expensive route to the point of consignment, notwithstanding the sugar had moved to the point of consignment by a more expensive route.

60. The concessions and advantages enumerated above as granted by the refiner to favored purchasers were frequently granted under threat of a purchaser to withdraw his business as a customer of the refiner, or upon representations by a purchaser that such concessions and advantages could be obtained from a competitor of the refiner. While usually given in good faith to meet supposed competition, such competition was frequently fictitious and non-existent, [fol. 83] and the invention of a purchaser who was secure in his knowledge that the refiner was without the means to ascertain the truth. For the refiner to have refused the demand would have meant probable loss of the purchaser's business as a customer of the refiner, as the purchaser would have felt bound to withdraw his business and give it to a competitor to substantiate his claim as to the existence of such competition, whether in fact it existed or not. In no cases did the concessions or advantages have any relation to any saving to the refiner by reason of the quantity purchased. In many cases the concessions and advantages were secret and withheld particularly from the competitors of such purchaser. Indeed, the concessions and advantages to be of any value to the purchaser had to be discriminatory and withheld from his competitors. Their only value lay in the discrimination they afforded. For the refiner to have granted them to all purchasers would have amounted to a reduction of the refiner's net price to all purchasers, and no purchaser would have had any advantage over any other. In consequence such general reduction would have only resulted in new demands upon the refiner by purchasers for further discriminatory concessions and advantages.

61. The refiners themselves were to blame for contributing to the spread of these evils. Frequently a refiner would offer some of the same concessions and advantages hereinbefore described as inducements to the customers of other refiners to place orders with him. The result, however, to the industry and trade in refined sugar of the discriminatory [fol. 84] advantages in favor of certain purchasers and of the acts of the refiners themselves was utter demoralization in the industry and trade. Not only were the discriminatory advantages inherently unfair to dealers in and users of refined sugar who did not receive them, but the effect of such discrimination was a constantly increasing monopoly in the hands of the favored dealers in sugar, and in the hands of the favored users of sugar in manufactured products by enhancing the latter's power over their competitors in the sale and distribution of such products. The margin of gross profit in the retail trade in sugar has always been extremely small. It has never been and it is not now sufficient to enable the small retailer to grant any considerable part of it to his own customers without involving himself in expense or loss. Nevertheless the small retailer to hold his trade was compelled to meet the competition of the favored retailer, with such consequent expense and loss. This created among the many retailers of the country a reluctance to sell sugar to their customers at all. Customers' orders would not be entirely filled, the small retailer excusing himself on the ground that he was low in sugar. Sugar in many cases ceased to be suggested to such customers as a part of their daily orders given to the family grocer. There being less sugar placed in the homes and kitchens of the consuming public, less sugar in consequence was being consumed, to the detriment and restraint of the trade.

62. The discriminatory practices heretofore described not only resulted in an utter demoralization of normal competition, with the consequent disadvantages above described [fol. 85] to the large number of purchasers of sugar who contributed the volume of the refiners' sales, but the practices lent themselves readily to dishonesty and misrepresentation. Under these circumstances the ethics and morality prevailing in the industry and the trade were rapidly deteriorating. Purchasers had ground for belief that their competitors were securing special advantages and an atti-

tude of suspicion and distrust prevailed which promoted resort to further unfair practices which would not have been employed had purchasers been able to feel secure that sugar was being sold to all alike on open and equal terms. This attitude of mistrust tended to increase the practices which gave rise to it, and it became apparent to all in the industry that, if a sound basis of mutual confidence and fair dealing was to be restored, secret discriminations and special advantages must be completely abolished so that the evils incident thereto could be eliminated and the temptation to, and opportunity for fraud removed.

63. One of the forms under which the secret discriminations and advantages heretofore described masqueraded was the secret alleged quantity discount. Because of conditions in the sugar refining industry there is no room for, or economic justification of, true quantity discounts in the sale of refined sugar. As hereinbefore stated, refined sugar is processed from raw sugar. Raw sugar constitutes at all times an imported part of the cost to the refiner of his own product and of the refiner's price to the trade. Such cost of raw sugar, plus the United States customs duty thereon accounts for approximately 78⅓% of such selling price. [fol. 86] These items are fixed for the refiner irrespective of his volume of production. The raw sugar markets of the world do not allow any discount for quantity purchased, whether that quantity be one bag or a shipload. No discount whatsoever is received by the refiner in insurance or transportation charges on raw sugar imported because of quantity insured or transported. The tariff is the same upon every pound imported regardless of quantity. There is produced from raw sugar about 93% by weight of refined sugar, but the approximate 7% lost in refining has been paid for by the refiner as well as the tariff thereon. Brokerage is paid by the refiners to brokers on the basis of 100 pounds of refined sugar sold regardless of quantity. Freight charges, a part of which are necessarily absorbed by the refiners to meet and maintain competition, are the same for one carload or many carloads. Because of the foregoing distribution of costs in the sugar refining industry, the basis and economic justification for quantity discounts would be extremely limited apart from the presence of other factors which render such discounts economically unjustifiable and a mere cloak for conceding special advantages and

discriminations. The location and distribution of purchasers, the conditions determining the costs of refining sugar and trade practices prevailing in the industry deprive quantity discounts in the sugar refining industry of these characteristics which afford economic justification for them in many other industries, and make the granting of such discounts an unsound business practice from the standpoint of both purchasers and refiners. The secret discounts which were given under the color or pretense of quantity discounts [fol. 87] in the sugar refining industry were no more than special advantages to favored purchasers of sugar to the disadvantage of their competitors. In all cases they exceeded any justifiable discount in respect of the quantity purchased as measured by any saving to the refiner. Accordingly if the unfair and discriminatory practices prevalent in the industry were to be eliminated, it was necessary to eliminate the secret and fictitious alleged quantity discounts which afforded a loophole for such advantages and discriminations.

64. The advantages given to favored purchasers of sugar, owing to the small margin of gross profit to the refiner and the fact that they were not made up to the refiner by any commensurate saving, had to be compensated for, unless the refiner was himself to suffer a loss, by an increased price of sugar to other purchasers who did not receive the discounts, concessions and other advantages. This increased price to some purchasers in turn reacted further upon their willingness to handle sugar in their retail trade, particularly as they knew that they were paying the refiner for the discriminatory advantages given to their competitors.

65. As hereinbefore alleged, a special advantage which favored purchasers of sugar received from the refiners was the payment to them of the amount of the brokerage on their purchasers, or some part thereof, in consideration of their dealing directly with the refiner. For the refiner to pay to purchasers, in consideration of their dealing directly with him, any part of the saving to him of the brokerage which he would otherwise pay would obviously [fol. 88] place all such purchasers at a competitive advantage over other purchasers who buy sugar through brokers. The effect of this would be to encourage, and in order to prevent discrimination refiners would be compelled to permit all purchasers to deal directly

with them. This would result in a great competitive advantage to the larger refiners with the resources to build up and maintain large sales organizations of their own, and the building up of sales organizations generally by all refiners would result in increased costs to the industry. In the present condition of the trade in refined sugar the services of ethical and legitimate brokers are necessary to the refiners and to the public if competitive conditions in the industry among purchasers of sugar on the one hand and among refiners on the other are to be maintained.

66. Practically all refined sugar is sold through brokers who receive for their services rendered to the refiner in the sale of his sugar a commission paid by the refiner. Discrimination in the sale of sugar can occur, and frequently did occur, through the instrumentality of the broker. A discriminatory price could as effectively be given through splitting with the purchaser the brokerage commissions paid by the refiner as through lowering the price charged to the purchaser by the refiner. If secret discriminations were to be abolished the opportunity for them through splitting the brokerage commissions had to be removed, since otherwise the sphere within which discrimination operated would simply be transferred from the refiner's price to the broker's commission. Since sales of the refiner's sugar take place through brokers, the refiner cannot [fol. 89] maintain open and equal prices and thereby avoid discrimination between his customers, except through establishing the conditions on which the broker makes such sales. The refiners therefore conceived it to be their legal right and duty to regulate the terms and conditions of their sales through brokers, so as to prevent unfair and unlawful discriminations between their customers.

67. As hereinbefore alleged, a special advantage which favored purchasers of sugar received from the refiners was the storage of sugar on the premises of the purchaser, or with warehouses in which the purchaser had a substantial financial interest or over which he exercised control. Such storage of sugar gave the purchaser a direct monetary advantage over his competitors who did not receive the privilege, if charges were paid for the storage, in that the charges or the purchaser's interest therein would operate to reduce the net cost to him of his sugar. But whether or

not storage charges were paid, the storage itself gave the purchaser other important discriminatory advantages in that it operated to relieve him of the necessity of keeping any of his capital invested in sugar; it gave him practically an exclusive option on all of the sugar so stored, for in the event of a rise in price all of the sugar so stored could be withdrawn by the purchaser; and it relieved him from all market risk in the event of a lowering of the market price of sugar. But in addition to the discriminatory advantages which such purchasers directly obtained over their competitors through the storage privilege, there were other [fol. 90] indirect discriminatory advantages which an unscrupulous purchaser could obtain, who, through financial interest or other affiliation, exercised a control over the warehouse in which the sugar was stored, and the obtaining of which discriminatory advantages the refiner was helpless to prevent. Such advantages were (a) the withdrawal of sugar from the warehouse without the warehouse making a report of such withdrawal at the time to the refiner so that the refiner could bill the purchaser, thereby giving the purchaser extended credit terms; (b) the splitting of warehouse charges with the purchaser; and (c) the connivance of the warehouse at the retransiting of sugar by the purchaser, which retransiting, frequently in itself unlawful, requiring the refiner to absorb more freight than he would otherwise absorb to the point of final delivery of the sugar, thereby causing discrimination against other customers of the refiner at such point of final delivery. All of such discriminatory advantages amounted to frauds upon the refiner. The withdrawal of sugar from the warehouse without report thereof at the time to the refiner was, in itself, the occasion of a further fraud upon the refiner in that the warehouse, to conceal the facts, had to continue to charge storage for the sugar which had been withdrawn. All of these frauds were difficult of detection, and the ability to commit them lay in the affiliation of the warehouse with the purchaser. The duty which the warehouse owed the refiner, moral, legal and contractual, actual or implied in the relationship of warehouseman to the storer of sugar, was so at variance with the interests of the purchaser, that when the purchaser controlled the warehouse the refiner [fol. 91] was deprived of that disinterestedness necessary in the warehouse to protect him against the purchaser's

frauds. Brokers engaged in the warehouse business were peculiarly susceptible to the machinations and exactions of unscrupulous purchasers. The discriminatory advantages herein described would be demanded of brokers as warehousemen, under penalty of the purchaser refusing to buy sugar through them. And the refiner, to some extent, was dependent upon the broker to disclose to him, and the broker owed the refiner the duty to disclose to him, the existence of discriminations and frauds, which by reason of the peculiar position of the broker with respect to the sale of the sugar withdrawn from the warehouse, were frequently known to the broker. In the opinion of the refiners it was their duty to eradicate the discriminatory evils and abuses above described, in so far as it lay within their power; and the only way in which said evils and abuses could be eradicated was by the refiners' ceasing to store sugar in the warehouses of customers or brokers or in warehouses with which they were affiliated.

68. No one refiner could stand out alone against the evils, abuses and unfair practices hereinbefore described which had grown up in the industry and among the trade, much less eradicate them. No one refiner could alone even prevent unfair discrimination between his own customers without great financial loss and even ruin to his business. Realizing that only cooperative effort on the part of all refiners could eradicate the evils and abuses that had grown up [fol. 92] in the industry and trade, and restore and maintain in the industry a high standard of business ethics, certain of the refiners undertook the organization of The Sugar Institute, Inc., as a trade association of refiners. Said refiners caused to be drawn up a proposed certificate of incorporation for the Institute, proposed by-laws, and a proposed Code of Ethics which was to be a code of fair trade practices to be voluntarily followed by the members of the Institute and by those under and associated with them in the conduct of their business. Said refiners submitted said proposed Code of Ethics and their proposed plan for the organization and operation of the Institute to the then Attorney General of the United States and received his approval of the same. Said certificate of incorporation and said by-laws are annexed hereto as defendants' Exhibits A and B, and said Code of Ethics is printed at length herein for more convenient reference thereto.

A letter from the office of the Attorney General of the United States, signed by the Assistant to the Attorney General, and approving said certificate of incorporation, said by-laws and said Code of Ethics, and generally the purposes of the Institute, is also annexed hereto and marked defendants' Exhibit C.

Code of Ethics of The Sugar Institute, Inc.

Among the purposes for which this Institute was formed were the following:

To promote a high standard of business ethics in the industry; to eliminate trade abuses; to promote uniformity [fol. 93] and certainty in business customs and practices; and to promote the service of the industry to the Public.

Accordingly, the organization of this Institute was a frank recognition, in and of itself, that customs and practices had grown up in the industry which were unsound and unbusinesslike, and which were harmful to producers and consumers alike. These customs and practices had resulted in confusion in the trade and discrimination as between purchasers, with a consequent uneven and uneconomic distribution of sugar to the public. The more important result to the industry was a demoralization and restriction of the retail trade in sugar and a retardation of the normal increase of consumption.

Believing that the trade will welcome a rectification of those business methods of the industry which have served to promote discrimination between purchasers; and believing that the public will be better served if the present channels of distribution are preserved and enlarged by maintaining equality of business opportunity among merchants of sugar; and believing that the members of the industry will recognize that it is in the interest of the industry to encourage and promote the wider distribution of its product to the end of increasing its consumption; the Institute declares its policy to be founded upon, and recommends to its members the adoption of business methods in accordance with, the following principles, to wit:

1. All discriminations between customers should be abolished. To that end, sugar should be sold only upon open prices and terms publicly announced.

2. The business of the sugar refining industry is that of refining a raw product, the price of which to the industry is the controlling factor in the price which the industry receives for its own refined product; and the industry as a purchaser of raw sugar receives no concessions for quantity purchased. Concessions made by the industry for the [fol. 94] quantity of refined sugar purchased have resulted in discrimination between customers, which discrimination the Institute believes it to be in the interest of the industry, of the trade and of the public to avoid. The Institute accordingly condemns as discriminatory, and in so far as this industry is concerned, as unbusinesslike, uneconomic and unsound, concessions made to purchasers on the basis of quantity purchased.

3. The following trade practices if not uniformly employed with all customers of a refiner are discriminatory. Furthermore, if not secretly employed they will of necessity be generally demanded, with the result that they must then be uniformy employed or abandoned. If uniformly employed they amount to a general price concession which should frankly take the form of a price reduction. The Institute condemns them as unethical except when practiced openly; as discriminatory unless uniformly employed; and in any event as wasteful and unbusinesslike.

(a) Variations from the open and publicly announced prices and terms, including (but without limiting the generality of this clause) the following:

Special allowances by way of discounts, brokerage, storage or advertising; variations from openly announced grade or package differentials; reduction or substitution of grades or packings; delayed billings; full discounts in cases of delayed payment; and rebates or other allowances by any name or of any nature.

(b) Split billings, except on cars moving on an 80,000 pound minimum and rate.

(c) The use of differential rates on consignments, or otherwise than on direct shipments over differential routes at customers' request.

(d) Payment of brokerage where any part thereof enures to the benefit of the purchaser.

[fol. 95] (e) Storage of sugar in customers' warehouses.

(f) Allotments to brokers running beyond the close of business of the day on which an advance in price is announced by the refiner.

(g) Special services to customers without appropriate charges therefor.

(h) The sale of second-hand sugar by refiners.

(i) Sales for export under contracts which do not provide for shipment out of the country.

4. The factors which enter into and determine the cost of his product for the refiner are so largely outside his control, and the probable margin of his profit so small, as to render highly speculative and unsound the giving by him of options to purchase his sugar. Furthermore, unless equally available to all customers alike, the giving of options is discriminatory. The Institute condemns the giving of options by refiners.

5. In the interest of a more even distribution to the trade, the Institute recommends that sugar shall be consigned only to recognized detention points for reshipment, or to recognized markets and then in care of railroad or steamship lines or to public or brokers' warehouses, and that the control of the sugar shall remain with the refiner.

6. The Institute recommends the use by members of uniform contracts to be adopted by the Institute for Eastern, Southern and Western markets.

69. Paragraph 3 (e) of the Code of Ethics has since been amended and now reads as follows:

"3 (e). Storage of sugar in warehouses in which customers or brokers are interested, or with which they are in any way affiliated."

Section 5 of the Code of Ethics has since been amended by striking out the words "or brokers" from before the [fol. 96] word "warehouses." In all other respects the Code of Ethics of the Institute has remained and now is identically as it was approved by the Attorney General of the United States on the 28th day of January, 1928.

70. The Code of Ethics of the Institute was not, and was not intended to be, and of necessity could not be, self-operative. To accomplish its results it required interpretation and administration and consultation and the collection of information, and the Institute was set up to provide these things. This was well known to the refiners who became members of the Institute, and, as more particularly appears from the letter from the office of the Attorney General of the United States, hereto attached and marked Exhibit C, it was known to him at the time of giving his approval to the Code of Ethics and to the Institute. These defendants allege that each and every act of the Institute, and each and every act of any one of them as a member of the Institute, or as a director or official of the Institute, or in connection with the work of the Institute, had for its only purpose and effect to promote the effectiveness of the Code of Ethics of the Institute in maintaining fair trade practices in the industry.

71. These defendants allege that at no time have they entered into any agreement to be bound by the Code of Ethics, or to do any of the acts or things set forth in said Code of Ethics, or to refrain from doing any of the acts or things prohibited in said Code, but that each of them individually and voluntarily recognizes, and has publicly [fol. 97] announced his recognition of, said Code as a statement of fair trade practices in the sugar refining industry, and that each of them individually and voluntarily attempts to conform the conduct of his business to the provisions of said Code in so far as in his own judgment he understands said Code to represent a statement of fair trade practices in the industry. These defendants deny that they have agreed or contracted to be bound by, or to follow, the resolutions or recommendations or interpretations made by the Institute, but allege that they maintain their freedom of judgment to adopt or follow such resolutions, recommendations or interpretations, and do follow the same voluntarily, so far as in their unfettered judgment the same appear to them to be reasonable and necessary for carrying into effect the Code of Ethics and for accomplishing the purpose of the same; but they allege that in many instances they have declined to follow such resolutions, recommendations or interpretations.

72. These defendants allege that the purpose and object for which the Code of Ethics was adopted and the Institute was formed, and for which each and all the activities of the Institute, and each and all the activities of these defendants in connection therewith and in accordance with the Code of Ethics and otherwise, have been carried on, were not, and are not, the attainment of any monopoly, or any restriction of competition, in the manufacture and sale of refined sugar, or any restriction of the freedom of the members of the Institute to compete with one another, but have at all times been and are solely the maintenance of fair and [fol. 98] ethical competitive practices which are essential to the preservation of competition among the members and among their customers, and the adequate and uninterrupted supply of refined sugar to the public at prices established by fair and economic competition. These defendants allege that for many years prior to the organization of the Institute and almost from the beginning of the refined sugar industry in the United States it has been the professed trade practice in the industry to sell refined sugar at prices and terms openly and publicly announced and equal to all, and that for many years prior to the organization of the Institute and almost from the beginning of the refined sugar industry in the United States it has been and is customary for refiners to openly and publicly announce their terms and generally to adhere thereto except in the instances and under the circumstances hereinbefore more particularly alleged or described. These defendants allege that the activities of the Institute and their own activities in connection with the Institute and in accordance with the Code of Ethics and otherwise have been chiefly for the purpose of preserving and maintaining this long established trade practice, which is essential to the continuance of free competition in the sale and marketing of refined sugar and to the benefits resulting to the public from such free and economic competition. These defendants allege that none of the activities of the Institute, and that none of their own activities in connection with the Institute or in accordance with the Code of Ethics or otherwise, have in any way deprived them of, or restricted them in, their freedom to compete with one another in the sale of refined sugar, or [fol. 99] have in any wise deprived them of, or restricted them in, their freedom to use their free and unfettered

judgment in devising or employing methods of competition which are consistent with the maintenance and perpetuation of free and economic competition in the industry.

73. These defendants allege that none of the activities of the Institute, and that none of the activities of these defendants in connection therewith or in accordance with the Code of Ethics or otherwise, have produced as their result or have tended to produce, any monopoly or any tendency toward monopoly in the production or sale of or trading in refined sugar, or any lessening or restriction of competition between these defendants or any of their customers or any brokers, jobbers, warehousemen, wholesale grocers, manufacturers or others engaged in or in connection with the wholesale or retail sale of refined sugar or in the purchase thereof. They allege, on the contrary, that competition continues active among them and in all branches of the industry. They allege that the only result produced upon competition by the activities of the Institute, and the activities of these defendants in connection therewith and in accordance with the Code of Ethics and otherwise, has been to cause competition to be carried on by fair and ethical methods, which have resulted, and are resulting, in greater advantages to the public from the operation of competition than was the case under the unfair and unethical methods of competition which the activities of these defendants have attempted to correct. They allege that neither the activities of the Institute nor any of such activities, nor any of the activities, of these defendants in [fol. 100] connection with the Institute, nor in accordance with the Code of Ethics, nor any other activities of these defendants have resulted in any increase of the price of refined sugar to any purchaser thereof, nor in any tendency to increase such price, but that on the contrary, the effect of each and all of said activities has been to prevent many purchasers of refined sugar from paying an increased open and announced price for sugar purchased, which increase would inevitably have resulted to compensate the refiners for the secret rebates and concessions granted to competitors of such purchasers; and has been to eliminate wasteful and uneconomic methods and practices in the sale and marketing of refined sugar, which methods caused an increased price to purchasers thereof, and has thereby

tended to reduce and has reduced the price of refined sugar to purchasers generally and to the consuming public.

74. These defendants allege that the Institute, through entirely fair and lawful means, has brought to the refined sugar industry of the United States, which at the time of the organization of the Institute was thoroughly demoralized, an amount of stability which has been beneficial to the industry, to the trade in refined sugar and to the public as purchasers and consumers of sugar. It has promoted a high standard of business ethics in the industry, and has eliminated many abuses in the trade in refined sugar, which in themselves were unfair and unethical, and which in all cases were discriminatory and worked to the advantage of the favored purchasers of refined sugar against their competitors, and which, had they been permitted to continue, [fol. 101] would have tended to create in the hands of such favored purchasers a monopoly of the trade and distribution of refined sugar in the United States. It has promoted uniformity and certainty in business customs and practices, and thereby been of service not only to the industry but to the trade in refined sugar and to the public as purchasers and consumers of refined sugar. It has increased the consumption of sugar and its more even distribution to the consuming public. By such stabilization of conditions in the industry and such increase of consumption of the product and more even distribution thereof to the public, it stabilized the employment of labor in the industry and increased the certainty of some profit for small dealers engaged in the retail trade in refined sugar. These defendants allege that if the Institute is dissolved as prayed for in the petition, the industry, because of the continued existence of the conditions which brought about the abuses and unfair and unethical practices formerly prevalent, will return to such abuses and unfair and unethical practices; that these will result in the uneven distribution of sugar to the consuming public and reduced consumption of sugar, with a consequent tendency to price increases; in the uneven and curtailed employment of labor, and the uncertainty of profit for the smaller dealer engaged in the retail trade in refined sugar; and will create a monopoly in the hands of favored purchasers of sugar and the elimination

from the trade in refined sugar of the smaller purchasers, and of the small retail dealers in sugar.

Having thus made a full answer to all the allegations [fol. 102] and matters and things contained in the petition herein, these defendants pray that the petition be dismissed, and for their, and each of their, reasonable costs and charges in this behalf incurred.

Wilbur L. Cummings, 48 Wall Street, New York, N. Y., Solicitor for the abovenamed Defendants.
Sullivan & Cromwell, of Counsel.

[fol. 103] EXHIBIT "A" TO ANSWER

Certificate of Incorporation of The Sugar Institute, Inc.

Pursuant to the Membership Corporations Law of the State of New York

First. The name of the proposed corporation is "The Sugar Institute, Inc."

Second. The purpose or purposes for which the Corporation is to be formed are as follows:

(1) To promote the progress and development of the sugar industry and its service to the public;

(2) To encourage and conduct scientific research into all branches of the industry, including the production, manufacture and distribution of sugar and its by-products;

(3) To provide its members and the public with comprehensive and accurate information and statistics concerning the industry;

(4) To promote the general use within the industry of sound accounting methods;

(5) To promote a high standard of business ethics in the industry; voluntarily to aid in the prevention of unfair competition and the elimination of trade abuses in all branches of the industry; and otherwise to aid in estab- [fol. 104] lishing healthful conditions of efficient production and distribution therein;

(6) To improve the relations between labor and its employers in the industry;

(7) Voluntarily to aid in the standardization of the various grades and forms of sugar and its by-products so that the industry may eliminate waste and better serve the public;

(8) To promote uniformity and certainty in the customs and practices of the industry;

(9) To establish credit bureaus for the benefit of the members of the Corporation and the industry in general;

(10 To provide arbitration boards to settle disputes between members and others and otherwise to aid in the amicable settlement of such disputes without resort to litigation;

(11) To disseminate information with respect to laws, rules and regulations pertaining to or which might affect the industry or any of its branches or connections;

(12) To conduct cooperative advertising on behalf of members of the Corporation and others in the industry;

(13) To establish and operate exchanges or trading-rooms where transactions in sugar and its by-products may be carried on;

(14) To provide clubhouses, restaurants, gymnasiums and other social and recreational institutions for members of the Corporation and others;

[fol. 105] (15) To hold meetings to discuss and take action on the problems of the industry.

(16) To conduct the Corporation's operations in all or any of its branches so far as permitted by law in all States, territories, dependencies and colonies of the United States and its insular possessions and the District of Columbia and in foreign countries; to maintain offices and agencies either within or without the State of New York; and as may be requisite in the convenient conduct of its operations, to purchase or otherwise acquire, hold, own, lease, possess, improve, sell, convey, mortgage, pledge or otherwise encumber or dispose of real and personal property of every class and description and property partaking of the nature of either real or personal property and rights, estates, interests, franchises, licenses and privileges in such property real, personal or mixed wheresoever situated or located.

In general, the Corporation shall have and may exercise all powers conferred upon it by the laws of the State of New York now or hereafter in effect.

The foregoing clauses shall each be construed as purposes, objects and powers and the matters expressed in each clause shall be regarded as independent purposes, objects and powers, and the enumeration of specific purposes, objects and powers shall not be construed to limit or restrict in any manner the meaning of the general terms or the general powers of the Corporation.

The Corporation is not organized for pecuniary profit [fol. 106] and no part of its income shall enure to the benefit of any member as such.

Third. The territory in which the operations of the Corporation are principally to be conducted is The City of New York, New York.

Fourth. The office of the Corporation is to be located in the City, County and State of New York.

Fifth. The number of directors of the Corporation shall be fifteen.

Sixth. The names and residences of the directors of the Corporation until the first annual meeting are as follows:

James H. Post, Brookhaven, Long Island.

Rudolph Spreckels, Ritz Carlton Hotel, 9 East 46th St., New York, N. Y.

Manuel E. Rionda, Alpine, New Jersey.

William S. Pardonner, Fort Wentworth, Savannah, Ga.

William T. Eldridge, Sugar Land, Texas.

Alexander Smith, 420 Lexington Avenue, New York, N. Y.

Jacob Moog, Reserve, La.

William Henderson, 729 South Peters St., New Orleans, La.

Frank E. Sullivan, 2111 Hyde Street, San Francisco, Calif.

George E. Keiser, 986 Fifth Avenue, New York, N. Y.

Henry E. Worcester, 15 Broad Street, Boston, Mass.

Wilbur L. Cummings, 277 Park Avenue, New York, N. Y.

[fol. 107] W. Edward Foster, 336 Prospect Avenue, Hackensack, N. J.

Rogers S. Lamont, 389 Clifton Avenue, Newark, N. J.

William H. Hoodless, 1037 North Delaware Avenue, Philadelphia, Pa.

Seventh. All of the subscribers to this Certificate are of full age; at least two-thirds of them are citizens of the United States; at least one of them is a resident of the State of New York, and at least one of the persons named as directors is a citizen of the United States and a resident of the State of New York.

In witness whereof, we have made, subscribed and acknowledged this certificate this 14th day of December, 1927.

Rudolph Spreckels, Geo. E. Keiser, Manuel E. Rionda, W. T. Eldridge, W. S. Pardonner, Wilbur L. Cummings, W. H. Hoodless, James H. Post, Henry E. Worcester, Charles Godchaux, Wm. Henderson, Alexander Smith, Frank E. Sullivan, W. Edw. Foster.

STATE OF NEW YORK,
County of New York, ss:

On this 14th day of December, 1927, before me personally came James H. Post, Rudolph Spreckels, Manuel E. Rionda, W. S. Pardonner, W. T. Eldridge, Alexander Smith, William Henderson, F. E. Sullivan, George E. Keiser, Charles Godchaux and Henry E. Worcester, to me known and known [fol. 108] to me to be the individuals described in and who executed the foregoing instrument and they severally duly acknowledged to me that they executed the same.

John J. Tierney, Notary Public, Kings County, New York. Clerk's No. 19, Registrar No. 8015. Certificate filed New York County, Clerk's No. 58, Register No. 8073. (Notarial Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 16th day of December, 1927, before me personally came W. H. Hoodless, to me known and known to me to be the individual described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

John J. Tierney, Notary Public, Kings County, New York. Clerk's No. 19, Registrar No. 8015. Certificate filed New York County, Clerk's No. 58, Register No. 8073. (Notarial Seal.)

STATE OF NEW YORK,
County of New York, ss:

On this 6th day of January, 1928, before me personally came Wilbur L. Cummings and W. Edw. Foster, to me known and known to me to be the individuals described in and who executed the foregoing instrument and they sever-
[fol. 109] ally duly acknowledged to me that they executed the same.

John J. Tierney, Notary Public, Kings County, New York. Clerk's No. 19, Registrar No. 8015. Certificate filed New York County, Clerk's No. 58, Register No. 8073. (Notarial Seal.)

I, Justice of the Supreme Court of the First Judicial District of the State of New York, do hereby approve the foregoing Certificate of Incorporation of The Sugar Institute, Inc.

Dated, New York, N. Y., January 6, 1928.

Philip J. McCook, Justice of the Supreme Court of the State of New York.

STATE OF NEW YORK,
Department of State, ss:

I certify that I have compared the preceding copy with the original Certificate of Incorporation of "The Sugar Institute, Inc.", filed in this department on the 7th day of January, 1928, and that such copy is a correct transcript therefrom and of the whole of such original.

Witness my hand and the official seal of the Department of State, at the City of Albany, this ninth day of January, one thousand nine hundred and twenty-eight.

Frank S. Sharp, Deputy Secretary of State. (Seal.)

No. 39485.

[fol. 110] STATE OF NEW YORK,
County of New York, ss:

I, William T. Collins, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify that I have compared the preceding with the original Certificate of Incorporation of The Sugar Institute, Inc., on file in my office, and that the same is a correct transcript therefrom, and of the whole of such original. Indorsed: Filed. Recorded Jan. 7, 1928, 11.57 A. M.

In witness whereof I have hereunto subscribed my name and affixed my official seal, this 10 day of Jan. 1928.

William T. Collins, Clerk. (Seal.)

[fol. 111] EXHIBIT "B" TO ANSWER

By-Laws of The Sugar Institute, Inc.

Article I

Members

SECTION 1. The members of the Corporation shall be elected from such individuals, firms, partnerships, associations and/or corporations as are engaged in the business of manufacturing and/or refining sugar. Members shall be elected by the vote of a majority of the directors of the Corporation present and voting at any meeting of the Board of Directors, but shall not become members until their acceptance of such membership in writing has been deposited with the Secretary of the Corporation and until payment of the initiation fee as hereinafter provided.

SECTION 2. Any member may resign by delivering his resignation in writing to the President, a Vice-President or the Secretary of the Corporation after the payment of all his dues payable prior thereto, together with his share of all assessments theretofore made by the Board of Directors, whether or not the same shall have become due according to their terms.

SECTION 3. Any member may be expelled from membership for non-payment of dues or assessments or for any conduct which, in the opinion of the Board of Directors, is [fol. 112] prejudicial to the purposes, principles or interests of the corporation or for any other cause deemed sufficient by the Board. Upon the expulsion of a member, his share of all assessments theretofore made by the Board of Directors shall forthwith become due and payable. Such expulsion shall be only by the vote of at least two-thirds of the directors present at a meeting of the Board duly called and held for the purpose of taking such action, except that a member may be expelled for non-payment of dues or assessments by the vote of a majority of the directors pres-

ent at any meeting of the Board duly called and held, and notice of such proposed expulsion for non-payment of dues or assessments need not have been stated in the notice of the meeting; provided, however, that a member may not be expelled for non-payment of dues or assessments unless he has been given notice of such delinquency at least thirty days prior to the date of the vote of the Board so expelling him; and further provided, that no member shall be expelled for any cause other than non-payment of dues or assessments unless such member shall have been given a reasonable opportunity to appear in person or by representative before the Board to answer the charges made against him.

SECTION 4. The Secretary shall keep a book in which shall be recorded the names of the members of the Corporation, their addresses as from time to time furnished for that purpose, the dates upon which they became members respectively, and, if any members shall cease to be such, the date of such cessation.

[fol. 113]

Article II

Meetings of Members

SECTION 1. The annual meeting of the members of the Corporation for the purpose of electing directors and transacting any such other business as may properly come before the meeting shall be held at the office of the Corporation in the City of New York specified in the notice of the meeting, on the second Tuesday in January of each year, unless such date be a legal holiday and in that event upon the next succeeding business day, at 12:00 o'clock noon or at such other hour on that day as may be fixed by the Board of Directors and stated in the notice of the meeting; but the first annual meeting shall be held on the second Tuesday in January, 1929.

SECTION 2. Special meetings of the members of the Corporation may be called at any time by the Board of Directors or the President, or in his absence by a Vice-President, and shall be called by the President, a Vice-President or the Secretary upon the request of any three members delivered to such officer in writing and stating the purpose or purposes of such meeting.

SECTION 3. Notice of all meetings of the members of the Corporation specifying the purpose or purposes for which the meeting is called and the time when and the place where it is to be held shall be given by personally serving such notice upon each member or by mailing the same to each member at his address as the same appears in the membership book of the Corporation, not less than fifteen nor more [fol. 114] than forty days prior to the date of the meeting.

SECTION 4. The presence in person or by proxy of a majority of the members of the Corporation, shall be sufficient to constitute a quorum for the transaction of business at meetings of members; and if there be no such quorum, a majority of the members present in person or by proxy may adjourn the meeting from time to time. At all meetings of members each member shall be entitled to one vote. The President, or, in his absence, a Vice-President, or, in the absence of both, a chairman chosen by the meeting shall preside at all meetings of members.

Article III

Directors

SECTION 1. The business and affairs of the Corporation shall be managed by its Board of Directors. Directors shall be elected by the members at their annual meeting to hold office until the next annual meeting of members and until the election and qualification of their respective successors. Directors need not be members.

SECTION 2. Whenever any vacancy shall have occurred in the Board of Directors by death, resignation, increase of the number of directors, or otherwise, it may be filled by the Board at any meeting unless, prior to such action of the Board, the members shall have filled such vacancy at a meeting of members duly called for the purpose, and the person so chosen by the Board or members shall hold office [fol. 115] for the unexpired term of the director whom he succeeds.

SECTION 3. The annual meeting of the Board of Directors for the election of officers shall be held as soon as practicable after the annual meeting of members and if such meeting of the Board shall be held immediately after the final adjournment of the annual meeting of members and

on the same day and at the same place, notice thereof need not be given. Regular meetings of the Board may be held at such times and at such places and without notice or on such notice as the Board may from time to time determine. Special meetings of the Board may be called at any time by the President, or in his absence, by a Vice-President, and shall be called by the Secretary on the request of two members of the Board. Such request shall be in writing and shall state the purpose or purposes of the meeting. Telegraphic notice of each special meeting shall be sent to each director not less than six days before such meeting. Meetings may be held at any time without notice if all of the directors are present or if notice of the meeting is waived in writing by those not present.

SECTION 4. The presence in person of a majority of the directors shall be sufficient to constitute a quorum for the transaction of business at any meetings of the Board; and if there be no such quorum a majority of the directors present may adjourn the meeting from time to time.

Note: The Certificate of Incorporation and the above Section 4 were modified by the adoption at the annual meet-
[fol. 116] ing of members, January 17, 1929, of the following resolution:

Resolved, that the number of Directors of the Sugar Institute, Inc., be and it is hereby increased from fifteen to twenty-eight, of which ten shall constitute a quorum for the transaction of business.

Article IV

Committees

SECTION 1. The Board of Directors may in each year elect from their number an Executive Committee to consist of such directors as the Board may from time to time determine. The Board of Directors shall have power at any time to change the members of such Committee and to fill vacancies therein. All powers of the Board of Directors when not in session, in respect of the management and control of the business and affairs of the Corporation, unless otherwise provided by law or in these By-Laws or by resolution of the Board of Directors, shall be vested in and may be exercised by the Executive Committee; provided, how-

ever, that the Executive Committee shall not be empowered to elect or expel members, to fill vacancies in the Board of Directors, to amend these By-Laws or to change the Code of Ethics. If any member of the Executive Committee shall be unable to attend a meeting of the Committee, the Committee may elect another member of the Board of Directors to fill the vacancy for such meeting. All action by the Executive Committee shall be recorded and reported to the Board of Directors at their meeting next succeeding [fol. 117] such action, and shall be subject to revision or alteration by the Board of Directors; provided, however, that no rights of third parties shall be affected by any such revision or alteration. The Executive Committee shall fix its own rules of procedure and may meet when and as provided by such rules or by resolution of the Board of Directors. The presence in person of a majority of the members of the Executive Committee shall be necessary to constitute a quorum for the transaction of business at all meetings of the Executive Committee; and if there be no such quorum, a majority of the members present may adjourn the meeting from time to time.

SECTION 2. The Board of Directors shall appoint from their number, or otherwise, an Ethics Committee which shall formulate a Code of Ethics for members of the Corporation and the sugar industry in general. After the Board of Directors' approval of such a Code of Ethics, or any revision or modification thereof, the same shall be submitted to the members of the Corporation at a meeting of members duly called for the purpose. So much of said Code of Ethics submitted by the Board of Directors, or any revision or modification thereof, as shall be adopted by four-fifths of all of the members of the Corporation shall constitute the Code of Ethics of the Corporation. Subject to the foregoing provisions of this section, such Committee shall perform such other duties and shall have such other powers as may from time to time be delegated to it by the Board of Directors.

SECTION 3. The Board of Directors may appoint from their number, or otherwise, a Cost Accounting Committee [fol. 118] upon which shall devolve the duty of formulating scientific systems of cost accounting susceptible of application to the business of the members, with a view to enabling members to know accurately the cost of their products.

Such Committee shall perform such other duties and shall have such other powers as may from time to time be delegated to it by the Board of Directors.

SECTION 4. The Board of Directors may appoint from their number, or otherwise, a Statistics Committee, which shall study ways and means of furnishing members and others with information and statistics concerning the vital facts of the sugar industry. Such Committee shall work in conjunction with the Cost Accounting Committee and shall submit to the Board of Directors a detailed plan of reports to be made by the members to the Corporation. After the Board of Directors' approval of such a plan, or any revision or modification thereof, the same shall be submitted to the members at a meeting of members duly called and held for the purpose. So much of said plan submitted by the Board, or any revision or modification thereof, shall require the votes of four-fifths of all of the members of the Corporation for its adoption. Such Committee shall perform such other duties and shall have such other powers as may from time to time be delegated to it by the Board of Directors, except that no plan requiring reports from members shall be binding upon any member without it shall have been approved by such member.

SECTION 5. The Board of Directors may appoint from their number or otherwise a Standardization Committee [fol. 119] which shall consider and advise the Board upon the standardization of the various grades and forms of the products of members of the Corporation, as to nomenclature, quantity and quality. Such Committee shall perform such other duties and shall have such other powers as may from time to time be delegated to it by the Board of Directors.

SECTION 6. The Board of Directors may appoint from their number, or otherwise, a Traffic Committee upon which shall devolve the duty of serving the Corporation in all matters relating to freight rates, traffic regulations and transportation generally. Unless expressly so authorized by the Board, such Committee shall not be empowered to publish freight rates, but shall furnish such information to the executive officers of the Corporation. Such Committee shall perform such other duties and shall have such other powers as may from time to time be delegated to it by the Board of Directors.

SECTION 7. The Board of Directors may appoint from their number, or otherwise, an Arbitration Committee upon which shall devolve the duty of appointing arbitrators to settle disputes between members of the Corporation upon application for such appointment by the interested members. Such Committee shall study and advise upon the elimination of sources of disputes in the sugar industry, and, in cooperation with counsel, shall advise as to standard arbitration clauses to be inserted in contracts of members. Such Committee shall perform such other duties and [fol. 120] shall have such other powers as may from time to time be delegated to it by the Board of Directors.

SECTION 8. The Board of Directors may appoint from their number, or otherwise, a Credit Committee, which shall consider and report to the Board upon the feasibility of establishing credit and collection bureaus to protect the members of the Corporation from dishonest and irresponsible customers. Such Committee shall also consider the standardization of credit terms allowed by members of the Corporation to their customers. Such Committee shall perform other duties and shall have such other powers as may from time to time be delegated to it by the Board of Directors.

SECTION 9. The Board of Directors may appoint from their number, or otherwise, a Labor Relations Committee, upon which shall devolve the duty of studying and reporting on the relations of members to the labor employed by them, with a view to improving such relations to the betterment of the industry and its service to the public. Such Committee shall perform such other duties and shall have such other powers as may from time to time be delegated to it by the Board of Directors.

SECTION 10. The Board of Directors may appoint from their number, or otherwise, an Insurance Committee upon which shall devolve the duty of considering and safeguarding the interests of members in their relations with insurance companies and of giving such information and other service in connection therewith as may be proper and practicable. Such Committee shall perform such other duties and shall have such other powers as may from time to time [fol. 121] be delegated to it by the Board of Directors.

SECTION 11. During the month of December in each year, the Board of Directors shall appoint a Nominating Com-

mittee of three members or representatives of members, whose duty it shall be to nominate candidates for directors to be elected at the next annual meeting of members. Such Committee shall notify the Secretary in writing, at least twenty days prior to the date of such annual meeting, of the names of such candidates, and a copy of such nominations shall be served upon or mailed to each member together with the notice of such annual meeting. Such Committee shall perform such other duties and shall have such other powers not inconsistent with the foregoing as may from time to time be delegated to it by the Board of Directors.

SECTION 12. The Board of Directors may appoint other committees, which shall exercise such powers as may be conferred upon them by the resolution appointing them.

SECTION 13. Each of the aforesaid Committees shall fix its own rules of procedure and may meet when and as provided by such rules or by resolution of the Board of Directors. The Board of Directors shall have power to change the members of such Committees, to fill vacancies therein, and, except as to the Nominating Committee, generally to supervise the work thereof.

[fol. 122]

Article V

Officers

SECTION 1. The officers of the Corporation shall consist of a President and one or more Vice-Presidents, a Secretary and a Treasurer. Such officers shall be elected by the Board of Directors and shall be subject to removal by it. The Board may also elect a Chairman of the Board and a Chairman of the Executive Committee, and/or such other officers, agents and/or employees as it may deem proper and may remove them in its discretion. The same person may hold more than one office. If the Board shall fail to elect a Chairman, the President may preside at meetings of the Board and may take part in the discussions of the Board, but unless a director, shall not be entitled to vote.

SECTION 2. The officers of the Corporation shall have such powers and duties as generally pertain to their respective offices, as well as such powers and duties as from time to time shall be conferred upon them by the Board of Direc-

tors. In the discretion of the Board of Directors, the Secretary may be designated the Executive Secretary. In this event he shall be an ex officio member of all committees, and, in order to insure economy and uniformity of purpose, recommendations of proposed measures, projects and expenditures arising from each committee shall be prepared by him for presentation to the Board of Directors by the committee chairman or otherwise as the President may direct. The Executive Secretary shall keep in close touch with all activities of the Corporation and shall [fol. 123] inform members regarding matters of interest to them. He shall have authority to employ and remove, subject to the approval of the President, employees of the executive department. He shall have charge of the offices and property of the Corporation, subject to the direction of the President and the Board of Directors.

SECTION 3. No director or other officer shall receive, directly or indirectly, any salary, compensation or emolument from the Corporation, either as such officer or director or in any other capacity, except upon the concurring vote of a majority of the directors present and voting at any meeting of the Board of Directors or a majority of the members of the Executive Committee present and voting at any meeting thereof; provided, however, that the vote of the director or officer who is to receive such salary, compensation or emolument shall not be used to constitute such majority or his presence to constitute a quorum at such meeting.

Article VI

Dues

SECTION 1. Each member shall pay to the Corporation on or before his acceptance of membership, an initiation fee of $500.

SECTION 2. On or before the first day of each fiscal year, each member shall pay to the Corporaation annual dues in the amount of $500 for the said fiscal year.

SECTION 3. The Directors shall from time to time make and fix the time of payment of such additional assessments [fol. 124] upon members as may be necessary to carry on the operations of the Corporation. Each such assessment shall be divided among the members in proportion to the

amount of their respective melts for the fiscal year prior to the fiscal year in which such assessment is payable.

Article VII

Dissolution

Upon dissolution, the assets of the Corporation remaining after the payment and discharge of all debts and liabilities of the Corporation shall be distributed to the members in proportion to the amounts of their respective contributions, by way of dues, assessments or otherwise, to the funds of the Corporation since the commencement of the fifth fiscal year next preceding the fiscal year in which the dissolution is effective (except for the continuance of the Corporation for the purpose of discharging existing obligations, collecting and distributing its assets, and doing other acts to wind up its affairs) or since the organization of the Corporation, whichever period is the shorter. Upon the date on which the dissolution is effective as aforesaid, all assessments made by the Board of Directors prior to such date shall become due and payable.

Article VIII

Miscellaneous

Section 1. All checks, drafts, promissory notes, acceptances or other instruments for the payment of money shall be signed in such manner as may be provided from time to [fol. 125] time by the Board of Directors.

Section 2. The seal of the Corporation shall be in such form as may be determined upon by the Board of Directors, which shall have power to alter the same at pleasure.

Section 3. The fiscal year shall commence on the first day of January in each calendar year and shall end on the last day of December in such year.

Section 4. Full and complete minutes shall be kept of all matters discussed and all action taken at all meetings of members and directors of the Corporation, and such minutes, together with all records, files and correspondence of the Corporation shall be preserved and held open at all times to any public official or other person who may have any lawful and sufficient reason to be informed concerning

any or all of the activities or transactions of the Corporation.

Article IX

Amendments

These By-Laws may be altered, amended or repealed at any meeting of the members by the vote of four-fifths of the members present thereat, provided that notice of the proposed alterations, amendment or repeal shall have been given in the notice of the meeting.

[fol. 126] EXHIBIT "C" TO ANSWER

(On letterhead of Department of Justice, Office of the Assistant to the Attorney General

Washington, January 26, 1928.

Wilbur L. Cummings, Esquire; Messrs. Sullivan & Cromwell, 49 Wall Street, New York City

Re: Sugar Institute, Inc.

DEAR SIR:

We have considered the papers which you recently submitted in final form in connection with the organization of the Sugar Institute, Inc.

From these papers and our earlier discussions with you, Mr. Babst and Mr. Post, we understand that the purposes to be accomplished by the organization of the Sugar Institute are to stabilize the economic conditions affecting the sugar industry and to eliminate unfair practices in marketing refined sugar. We also understand that these purposes are to be accomplished (1) by the organization of a membership corporation pursuant to the Membership Corporations Law of New York, called the Sugar Institute, Inc., in which all of the refiners of cane sugar in this country shall have membership, and (2) the adoption of a Code of By-Laws and a Code of Ethics, copies of which you have submitted to this Department.

Based on our understanding of the purposes to be accomplished by the organization of the Sugar Institute, Inc. and the adoption of the By-Laws and the Code of Ethics, referred to, we believe this organization represents a bona-

[fol. 127] fide combination of persons engaged in the refining and marketing of cane sugar to stabilize the economic conditions affecting their business by means of a trade association whose activities shall be conducted in accordance with the law as stated in the decisions of the Supreme Court in the Maple Flooring and Cement cases, and to establish such practices in marketing as will encourage a wider distribution and consumption of sugar in this country, and thus increase trade and commerce in that important commodity. So long as these purposes are maintained by the Sugar Institute, and the effect of this combination is not found to restrain interstate trade and commerce, we do not believe that the organization of this trade association presents a situation which warrants the institution of proceedings under the direction of the Attorney General for violation of the anti-trust laws. It will be understood, however, that the foregoing statement shall not be construed to preclude the Department of Justice from instituting proceedings at any time against the Sugar Institute, Inc. or any other persons engaged in the business of refining and selling cane sugar in interstate commerce, in the event evidence of a violation of the anti-trust laws is found.

In view of the great public interest in having fair competition maintained in the manufacture and sale of refined sugar, and in order that the actual effect on interstate trade and commerce of the organization of the Sugar Institute, Inc. may be ascertained, the Department of Justice will continue to observe the practical operation of this trade association, as well as other factors which may affect com- [fol. 128] petition in this commerce. In this connection, you have assured me that the Sugar Institute, Inc. desires to co-operate fully with the Department, and to that end we may call upon the Institute from time to time for further information.

With respect to the specific provision of the Code of Ethics of the Institute designed to prevent unfair competition, we desire to point out that the Department of Justice has no authority to regulate or prevent unfair trade practices as such, jurisdiction in that respect having been expressly conferred by Congress on the Federal Trade Commission, pursuant to the provisions of the Federal Trade Commission Act.

Yours very truly, (Sgd.) William J. Donovan, The Assistant to the Attorney General.

[fol. 129] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING PETITION—Filed April 8, 1932

A motion having been made by the petitioner April 5, 1932, for an order amending the petition herein; it is hereby

Ordered that the petition herein be amended in the following respects:

In Section III, (17), after the second complete sentence of said paragraph, immediately following the word "monopolies" and immediately preceding the sentence beginning "Hereinafter" insert the following:

"(17a) In the course of carrying on the trade and commerce described in this petition, and as a part thereof, the Members and numerous merchants, dealers, wholesalers, and jobbers have engaged or employed the services of many brokers for the purpose of soliciting orders for the sale of refined cane sugar and in arranging for its sale, transportation, storage, and delivery. In performing such services said brokers have thus been engaged in such interstate trade and commerce.

"(17b) The Members have contracted for the sale of and have sold said refined cane sugar to merchants, dealers, wholesalers, and jobbers who have purchased the same for [fol. 130] resale. Many of said merchants, dealers, wholesalers, and jobbers have contracted for the sale, shipment, and delivery of such sugar in large quantities to many purchasers in states other than the states where said sugar has been held awaiting resale, and, pursuant to said contracts, and otherwise, have sold said sugar and caused its shipment, by rail and/or water and/or motor transportation, and its delivery across state lines, and have thus carried on interstate trade and commerce within the meaning of said Act of July 2, 1890.

"(17c) Carriers engaged in the business of rail and/or water and/or motor transportation have received and carried numerous shipments of said sugar across state lines and between the several states at the instance of the members, brokers, merchants, dealers, wholesalers, and jobbers,

and have thus engaged in interstate trade and commerce in said sugar. Numerous warehousemen have engaged in the business of storing said sugar held temporarily for further distribution in the course of the interstate trade and commerce herein described, and thus have been engaged in said interstate trade and commerce in refined cane sugar."

Make the remainder of (17) (beginning with the word "(Hereinafter") a new paragraph within said Section III, and number it (17d).

In Section V, (153), after the word "distributing," insert "warehousing,". After the word "sugar," insert "in interstate trade and commerce,".

Julian W. Mack, United States Circuit Judge.

Dated, New York, April 8, 1932.

[fol. 131] [File endorsement omitted.]

[fol. 132] In United States District Court

[Title omitted]

Order Amending Petition—April 20, 1932

Upon motion by the petitioner herein, notice of motion having been waived in open court by defendants' counsel, it is hereby

Ordered that the petition herein be amended so as to include the following additional allegation after Paragraph 51, at the end of page 19 of said petition, to wit:

X (par. 51a). Defendants agreed upon and concertedly adopted uniform and arbitrary price differentials for raw cane sugars purchased for their respective refineries, said price differentials to be based upon the quality of the raw cane sugar indicated by polarization tests, and agreed to restrict their allowances on high quality raw cane sugar.

Julian W. Mack, United States Circuit Judge.

Dated, New York, April 20, 1932.

[fol. 133] [Endorsed:] In Equity. No. 59-103. United States District Court, Southern District of New York.

United States of America, Petitioner, v. The Sugar Institute, Inc., et al., Defendants. Order Amending Petition.

[fols. 134 & 135] In United States District Court, Southern District of New York

Equity 59-103

United States of America, Plaintiff,

vs.

The Sugar Institute Inc., The American Sugar Refining Company; Margaret A. Jamison and Martha A. Jamison, Doing Business Under the Firm Name and Style of Arbuckle Bros.; California & Hawaiian Sugar Refining Corporation, Ltd., Colonial Sugars Co., The Cuban-American Sugar Co., Godchaux Sugars, Inc.; William Henderson, Hunt Henderson, Chris. Gambel and Fred Gambel, Doing Business Under the Firm Name and Style of Henderson Sugar Refinery; Imperial Sugar Co., W. J. McCahan Sugar Refining & Molasses Co., The National Sugar Refining Co. of New Jersey, Pennsylvania Sugar Co., Revere Sugar Refinery, Savannah Sugar Refining Corp., Spreckles Sugar Corp., Texas Sugar Refining Corp., J. D. and A. B. Spreckles Securities Co. (Doing Business Under the Trade Name of Western Sugar Refinery); J. F. Abbott, Earl D. Babst, W. Edward Foster, J. P. Cody, M. E. Goetzinger, George M. Rolph, William B. Tyler, C. B. Newman, George E. Keiser, Jacob Moog, I. H. Kempner, Harry G. Thompson, Louis V. Place, Manuel E. Rionda, James H. Post, Charles D. Bruyn, William H. Hoodless, Henry E. Worcester, Benjamin O. Sprague, Thomas Oxnard, Rudolph Spreckles, W. W. Harper, Edgar H. Stone, Alexander Smith, H. B. Moore, Frank E. Sullivan and Fred G. Taylor, Defendants

John Lord O'Brian, the Assistant to the Attorney General; James Lawrence Fly, Walter L. Rice, Special Assistants to the Attorney General; George Z. Medalie, United States Attorney.

Cadwalader, Wickersham & Taft, Solicitors for Defendants, Spreckels Sugar Corporation, Rudolph Spreckels,

Edgar H. Stone and W. W. Harper, (Cornelius W. Wickersham, Arthur L. Fisk, of Counsel); Sullivan & Cromwell, Solicitors for the Other Defendants, (John C. Higgins, John Dickinson, Hyman Zettler, S. Pearce Browning, Jr., Parker McCollester, of Counsel).

[fol. 136] OPINION

MACK, Circuit Judge:

By petition filed March 30, 1931, the United States seeks a decree under the provisions of the Sherman Act and acts amendatory thereof and supplemental thereto, dissolving the Sugar Institute, a trade association incorporated under the laws of New York, and enjoining certain corporations, firms and individuals, defendants herein, from engaging further in an alleged conspiracy in restraint of interstate commerce in sugar. In addition to the Institute, the defendants are fifteen sugar refinery companies which either have been or are members thereof and various individuals who either have been or are active in its management and in the direction of the activities alleged to constitute the conspiracy.

The testimony is transcribed in over 10,000 typewritten pages; more than 900 exhibits covering many thousands of pages were introduced in evidence.

The petition charges a comprehensive conspiracy affecting almost all phases of the sale and distribution in the domestic markets of domestic refined cane sugar, and incidentally beet and offshore sugar. The complicated and frequently disputed issues of fact and of law involved must be approached with the more important factors of the sugar industry in mind.

I. Background

The Institute was organized in December, 1927, and began operation the following month. The scope of its activities may be gathered to some extent from its "Code of Ethics", reproduced in the appendix hereto. The implications of the code were worked out in great detail by "Interpretations" adopted pursuant thereto. The code, together with these rulings the nature of which is hereinafter more fully described, reveals much of the purpose and plan of the Institute.

The Institute members refined practically all of the imported raw sugar processed in this country. They describe their product as "domestic refined". In recent years, the wholesale value thereof has been as much as $500,000,000. Prior to the Institute, they provided in excess of 86% of the sugar consumed in the U. S. They have since supplied from 70% to 80% thereof; in some States, particularly in the New England and Middle Atlantic areas, they have supplied in excess of 90%, in only a few States throughout [fol. 137] the country is their share less than 55%. (Ex. E-15.)[1] Manufacturers of beet and of domestic cane sugar and cane refineries located in the insular possessions and foreign countries provide the remainder of the nation's supply.

Domestic refined, beet sugar, and foreign and insular refined known in the trade as "offshore" refined, constitute about 99% of the nation's supply. The balance, which consists of domestic cane grown and refined principally in Louisiana, is not, so far as the record shows, an important factor in the national markets. Quantities of various sugars used in the United States in recent years are shown in Ex. D-15.[2]

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[1] Unless otherwise stated all figures herein are taken from defendants' data.

All figures are exclusive of corn sugars. The record does not reveal the extent to which they enter into competition.

[2] Reference on page 88.

EXHIBIT D-15

(Unit = 100 lb. Bag)

	1927		1928		1929		1930		1931	
	Amount	% of Total	Amount	% of Total	Amount	% of Total	Amount	% of Total	Amount	% of Total
1. Domestic Cane Sugar Refiners...	99,061,118	82.5	95,259,545	76.0	99,910,673	78.5	97,645,582	76.2	88,068,308	71.0
2. Domestic Beet Sugar.....	17,308,502	14.4	23,741,591	19.0	19,073,035	15.0	21,209,629	16.6	25,385,504	20.5
3. Foreign & Insular Refined Cane Sugars.....	3,407,514	2.8	5,533,969	4.4	6,999,579	5.5	7,954,681	6.2	9,647,241	7.8
4. Louisiana Direct Consumption Cane Sugar.....	400,000	.3	800,000	.6	1,250,000	1.0	1,250,000	1.0	950,000	.7
Total.....	120,177,134	100.0	125,335,105	100.0	127,233,287	100.0	128,059,892	100.0	124,051,053	100.0

[fol. 138] Defendants' refineries are located in the vicinity of Boston, New York, Philadelphia, Baltimore, Savannah, New Orleans, Galveston and San Francisco. Only two defendants operate more than one plant: The National Co., with three refineries near New York; the American Co., with refineries in or near Boston, New York, Philadelphia, Baltimore and New Orleans. In 1927, American accounted for 25.06% of all sugar produced by defendants, National, for 22.07%; the others in that year ranged from Henderson's 1.13% to California and Hawaiians' 10.84%. (Ex. Y-14.) Capital employed ranged from Henderson's $2,037,975 to American's $119,854,340. (Ex. E-17.)[3]

Raw cane sugar used by defendants is imported principally from Cuba and to some extent from the insular possessions. It is obtained by clarifying juice extracted from the cane at mills near the plantations. The raws, which usually contain about 96% pure sucrose, are further clarified and purified at defendants' domestic plants to produce sugar 100% sucrose and ready for consumption. Ample supplies of raw sugar in a steadily declining [3a] market have been available since the formation of the Institute.

The Government does not contest defendants' claim that the refined sugar produced by them, is, as to physical and chemical properties, a thoroughly standardized commodity. It is undisputed that at least since the Institute the product of the various defendants has generally sold at a uniform price in any given trade area. The Government insists, however, as a basis for contentions hereinafter discussed, that because of certain preferences created by advertising and other means, the sugars of the several defendants are economically different products.

Beet sugar for many years has been an important factor in the domestic market and offshore sugar, since the Institute, has increasingly become such. See note 2, supra.

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[3] In 1931, American's share of defendant's production was 27.12%; National's, 19.27%, others from Henderson's 1.49% to C. & H.'s 13.09%. (Ex. Y-14.) Capital employed ranged from Henderson's $2,138,902 to American's $116,090,904. (Ex. E-17.)

[3a] From time to time, as recently, there have been rises.

Either or both offer some competition to defendants' product in nearly all trade areas, (Ex. E-15) and each has always sold at a differential below domestic refined.

The sugar beet is grown and the sugar therefrom produced and sold chiefly in the middle and far West, providing in some states well over 75% of the supply. It com- [fol. 139] petes, too, with other sugars, in a number of Southern and Middle Atlantic States. (Ex. E-15.) Although for most purposes practically identical with domestic refined, it has ordinarily, for several reasons, sold at a differential of 20¢ per hundred pounds. In the early years of the beet sugar industry, the grade was inferior; thus, a prejudice grew up against it, which to some extent has carried over to the present time. Beet sugar unlike domestic refined, is not sold in full assortments of grades and packages and is therefore less attractive to the trade. While 20¢ has been the customary differential, at various times and localities, it has ranged from 10¢ to 35¢ both before and since the Institute.

The relation of the Domestic Sugar Bureau to the beet manufacturers is similar to that of the Institute to the domestic refiners. They were informally organized at about the same time. A few months later, in the Spring of 1928, the Bureau was incorporated, with headquarters in Chicago. Its "Code of Ethics" is substantially identical with that of the Institute and is admittedly patterned after it. While defendants insist that the two trade associations are entirely independent, they freely admit that the Institute has sought and obtained a high degree of cooperation from the Bureau in practically all of its activities. Joint meetings have been held, questions of policy have been discussed, and action jointly taken. The two associations have continuously communicated by letter, telegram or personal contact of their officials. The evidence, however, does not support the contention that defendants have effected an agreement with the producers of beet sugar, through the Bureau, to maintain a fixed 20¢ differential, even though that differential may have prevailed more consistently since the creation of the Institute than theretofore.

Offshore sugar, which is practically a new factor in the domestic market, is refined principally in Cuba and to some extent the insular possessions. Its sale in this country is in the hands chiefly of four selling agencies. Its important

trade areas have been Middle Atlantic and Southern states, although substantial quantities of it have also been sold in other parts of the country. In some states, it has provided from 25% to 40% of the total supply. With the exception of Hershey sugar represented by H. H. Pike & Co., all of it is sold at a differential from 5¢ to 10¢ below [fol. 140] defendants' sugar. This is due to the fact that it has not been in the market long and also because it is offered in a limited assortment of grades and packages.

An agreement with the offshore interests (except Hershey) to sell at a fixed 5¢ differential is charged against defendants. The Government relies, in this connection, on a letter written by the executive Vice Secretary of the Institute, in which the statement is made that, "the Armstrong people [representative of an offshore refinery] * * * had sold their sugars strictly in accordance with our Code Rulings on a price differential of 5¢". (Ex. 324.) While this might be susceptible of the inference, as contended, that the 5¢ differential was the result of an agreement, the explanation offered therefor by defendants, that it was merely expressive of the fact that Armstrong had sold at such a differential is equally plausible. In view of the lack of other evidence to support the Government's charge and the failure to refute defendants' evidence of a varying differential, I cannot find that any such agreement was made by them with the offshore interests even though, as defendants freely admit, cooperation has been sought and obtained in many activities. Certain alleged activities however, are denied by defendants; of course as to these they likewise denied having sought such cooperation.

There is one other important factor in the sugar industry, which the Government charges has also been drawn into the conspiracy by defendants. The sugar merchandising firm of W. H. Edgar & Son of Detroit, although not directly engaged in the refining of sugar, offered substantial competition to some of the defendants by reason of its manifold activities. In 1928, it merchandised, according to testimony of the head of the firm, about 2% of all the sugar consumed in the United States.[4] It dis-

[4]. This is considerably more than the individual output of three of the smaller refineries which were members of the Institute.

tributed both cane and beet sugar and was Sales Agent for some beet companies in which the Edgar family was heavily interested. In addition, the Edgar family controlled the Edgar Sugar House, which engaged widely in the storage of sugar and also acted as sugar brokers. The Edgar interests, moreover, operated a chain of cash and carry sugar stores in Michigan, Indiana, Ohio, New York, [fol. 141] West Virginia and Pennsylvania. The Institute sought and obtained from the Edgar interests a high degree of cooperation.

II. Pre-Institute Secret Concessions

Defendants assert that for a number of years prior to the formation of the Institute, the sale and distribution of sugar had become increasingly characterized by grossly unfair and uneconomic practices. This situation, defendants urge, provides a complete legal and economic justification for the steps taken through the Institute to correct it.

Defendants assert that the sugar industry has always purported to be one in which the product was sold on open published prices and that this in fact was done up to the year 1924. During the period 1917 to 1919, when the industry was under governmental control, prices were fixed and all forms of concessions and rebates were forbidden by the Government. But beginning perhaps as early as 1921 and increasingly thereafter, the practice developed on the part of some but not all refiners of giving secret concessions from their basis prices.[4a] Arbuckle, California and Hawaiian, Henderson, Revere and Western were the exceptions.[5] They have never indulged in the practice of secret concessions. The so-called "unethical" refiners, however, gave secret concessions and rebates in 60% to

[4a] Defendants' sugar is quoted at so much per pound per one hundred pound bag of "fine granulated" or "granulated". This is called the "basis price"; contracts are closed with reference to it but the purchaser has the option at stipulated differentials to specify for delivery under the contract an assortment of grades and packages.

[5] In 1927, these five refiners accounted for 25.45% of all sugar produced by defendants; in 1931, for 28.54% Ex. Y-14.

70% of the sugar sold by them in 1927, as estimated by one of defendants' principal witnesses. (R. 4594.) The need of secrecy was urgent, for if and as soon as it became known that a specific concession was granted, it would be generally demanded. That concessions and rebates were widely granted was of course generally known in the trade. Each refiner too, was able to find out in a general way the approximate prices and terms of his competitors. Moreover, many of the contracts carrying concessions revealed that fact on their face. But in the conditions prevailing prior to the Institute, it was impossible for refiners and purchasers to know with any degree of accuracy what prices and terms were granted in the innumerable transactions. The mere fact that many of the larger customers of the "unethical" refiners not infrequently received no concessions, indicates that the efforts at secrecy were at least fairly successful.

[fol. 142] Various causes undoubtedly contributed to the development of these selling methods. Probably chief among them is the substantial over-capacity since the war, stated in defendants' answer, to be about 50%. Among other causes assigned by defendants were (1) the lack of statistical information as to the amount of production, deliveries, and stocks on hand, causing overproduction, (2) the uncertainties which prevailed in the raw market during this period and which made the refined sugar industry highly speculative, (3) the fact that since 1922, most sugar has been sold through brokers and is thus somewhat outside of the refiners' control, and (4) the standardization of the several defendants' sugar which has made their sale depend almost entirely upon prices and terms offered.

The concessions granted were largely, although not entirely, arbitrary in character. While they were given principally to the large buyers of sugar, no system was followed in this respect; they were frequently granted to the smaller purchasers as well. Defendants assert that the refiner was thus largely at the mercy of the purchaser who, in order to secure a particular concession, would falsely represent that he could get it from a competitor. While there is little direct evidence that such misrepresentations were extensively resorted to, nevertheless, the refiners' fears in this respect appear to have been genuine.

Defendants further claim that the discriminatory nature of the concessions which were granted, was leading to the creation of monopolies among the distributors; that the leaders, most successful in obtaining concessions, were thereby potentially enabled to and in fact, to some extent, did secure monopolies in their respective trade areas. Some smaller distributors, defendants contend, had thus been put into so disadvantageous a position that they were disinclined to push the sale of sugar and as a result, in 1927, per capita consumption fell off about 10%.

It may well be that such discriminatory concessions tend to create territorial monopolies in sugar distribution. The evidence shows that certain smaller distributors did suffer because of the advantages enjoyed by the larger ones, [fol. 143] such as W. H. Edgar & Son. But I believe, that the advantages enjoyed by them and by several other large distributors were in largest measure attributable to their greater efficiency. Moreover, there is no substantial evidence that these distributors in fact obtained such monopolies.

With respect to the falling off of consumption in 1927, it must not be overlooked that, as one of defendants' principal witnesses indicated, the "slimness campaign" of 1927 had a substantial effect in discouraging the use of sugar. (R. 4598.) There is, however, some evidence that distributors of sugar did refrain from pushing it because they could not sell it profitably.

Defendants' contention that "the refiners who did not indulge in concessions were well on their way to becoming martyrs," and that "their problem was how long they could survive", (Fact Brief, pp. 9-10), is without substantial support in the evidence. While the "ethical" refiners may have been inconvenienced through the sales methods of some of their competitors and probably believed its effect on them to be harmful, they had no part in the first steps taken to form the Institute and were in no danger of being eliminated from the industry. Three of the five refiners who suffered losses in the year 1927, when the profits for the industry as a whole showed a substantial decline, were "ethical" companies. But the deficit shown in the statement of one of them, California and Hawaiian, is without much significance because of the special arrangement subsisting between C. & H. and its parent corporation, the owner of sugar plantations in

Hawaii. Moreover, despite the "fair competition" inaugurated by the Institute, two of the "ethical" companies showed substantially less profits for the post-Institute period, 1928 to 1931, than for the pre-Institute years of 1925 to 1927, while the profits of several of the "unethical" companies increased substantially in the post-Institute period.

The conditions which defendants allege confronted them just prior to the Institute are thus summarized in their brief:

"The refiners had had ample experience with the regime of secret concessions. They had witnessed a falling off in their sales due to the reluctance of wholesalers and retailers to sell sugar, because they could not compete. Their customers in large numbers were complaining that the system was wrecking their business. Sugar distribution was being concentrated in a few hands, and some of the refiners themselves were facing ruin." (Fact Brief, p. 15.)

[fol. 144] As the foregoing discussion reveals, this picture is greatly exaggerated. The declining profits for the year 1927 must be attributed, at least in large part, to causes other than the secret concessions system. Defendants themselves have complained of the enormous overproduction and the ruinous dumping that took place during that year. The "slimness campaign", too, had its effect. Nevertheless, although the picture is by no means as black as painted and the serious consequences foreseen, the loss of business and the ruin of refiners and distributors, are to a large extent speculative, the industry was characterized by highly unfair and otherwise uneconomic competitive conditions; arbitrary, secret rebates and concessions were the rule and the widespread knowledge of market conditions which the courts and economists have recognized as necessary for intelligent fair competition, were lacking. I believe the refiners' testimony that they were disturbed economically and morally over the then prevailing conditions. There is evidence, too, that at least American was concerned at the possibility of liability under the Clayton Act because of the discriminations resulting from the various concessions. I believe, too, that among the purposes for which the Institute was formed were, as de-

fendants' insist, (1) the elimination of secret concessions and selling of sugar on open, publicly announced terms; (2) the gathering and the dissemination of statistics not previously available, as to refined stocks, consumption, location of stocks throughout the country, production and current deliveries; (3) the elimination of practices which they deemed wasteful and (4) the institution of an advertising campaign to increase consumption. But it will be apparent from a discussion of the actual activities of the Institute and of its members, that these were by no means the dominant purposes.

III. The Sugar Institute

The agitation which finally resulted in the formation of the Institute began in the summer of 1927. Representatives of American, National, McCahan, Federal (reorganized in 1929, as Spreckles) and Lowry, the then operator of Pennsylvania, met with W. L. Cummins, later general counsel of the Institute, to discuss the situation. A series of meetings were held, the condition of the industry, with particular reference to undesirable practices and secret concessions, was discussed and in September, Cummings submitted to representatives of the Attorney General's [fol. 145] office a proposed Certificate of Incorporation and By-Laws for a trade association, together with a number of suggestions respecting trade practices.

In September, the other refiners were invited to attend a joint meeting. Representatives of each refiner met frequently in December; a Code of Ethics was worked out. It was submitted to and discussed with officials in the Attorney General's office and, as a result, some changes were made. According to Cummings' testimony, the code, finally adopted on January 7th, 1928, was substantially identical with that worked out when the discussions with the Department of Justice officials were held. With the exception of the two changes noted in the appended copy it has retained its original form.

Members of the Institute meet annually as well as in occasional special meetings. The Board of Directors meets generally monthly and the Executive Committee, composed of certain members of the Board, weekly. Various other committees have met from time to time. In February, 1928, Judge Sydney Ballou, until then general counsel of

California and Hawaiian, joined the Institute staff as Executive Secretary at a salary of $75,000 annually. Upon his death in October, 1929, his duties were assumed by the Vice Secretary*, whose annual salary was $25,000. Other Executive salaries amounted yearly to about $15,000. According to the testimony of the Office Manager of the Institute, other annual expenses were: salaries of a staff of stenographers, statisticians, etc., about $45,000 and overhead about $85,000; advertising average $450,000 annually. The Institute statement for 1931 shows, too, that in that year some $29,000 were spent for investigations. It is interesting to note that the total expenses for that year were set at some $838,000, of which, some $641,000 were for "advertising and publicity." Expenses were defrayed by levy on the members proportionate to their production.

Although the defendants have emphasized the reporting and statistical services of the Institute, the minutes and other records of the meetings of members, directors, executive committee and other committees, abundantly demonstrate that the Institute and its members were, to a very high degree occupied in their meetings with the various problems and practices relating to sales and distribution. [fol. 146] Defendants have insisted throughout that their activities have been characterized by the utmost good faith. In this connection, they cite their open dealings with the Attorney General's office both immediately prior to and after the formation of the Institute. As far as the evidence shows, the Department of Justice, in its three investigations of the Institute in 1928, 1929 and 1930, was given complete access to the Institute files. The record likewise shows that from time to time, as new issues of the Code and Code Interpretations were printed, copies thereof were forwarded to the Attorney General's office. But the Department of Justice was not notified of various important steps taken by the Institute which are now charged to be illegal and of course not as to those activities in which the Institute denies having engaged. Defendants' good faith must be largely a matter of inference to be drawn from their admitted or proven actions with respect to such and other matters.

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* Fred G. Taylor.

For convenience and clarity, the various activities of the defendants upon which plaintiff bases its charges of illegality, will be classified and separately considered although most of them are more or less vitally related to one another.

Defendants assert that the fundamental principle underlying practically all of these activities is expressed in Code 1:

"All discriminations between customers should be abolished. To that end, sugar should be sold only upon open prices and terms publicly announced."

To attain these results, defendants insist, was their primary purpose in creating and maintaining the Institute. Necessarily and admittedly implied in the agreement to sell only on open publicly announced prices and terms is the further obligation to adhere thereto until public announcement shall have been made of any change.

[fol. 147] IV.

Price Reporting

With respect to the reporting system adopted by the Institute, the Government alleges:

"Defendants have concertedly adopted and maintained a comprehensive system for the exchange of detailed and complete information relating to the prices, terms and conditions of current and future sales; they have agreed that the prices, terms and conditions of sale shall be reported to the Institute by the Members as a condition precedent to any sale of sugar; and they have agreed that no Member shall deviate from, or change, such prices, terms, or conditions until such Member shall deviate from, or change, such tions until such Member shall have given at least 18 hours notice of such deviation or change. The Institute has immediately relayed all such reports by wire to all members. Defendants have sold and are now selling all sugar under a binding mutual agreement to adhere strictly and without deviation, to the prices, terms and conditions reported to the Institute, and to maintain such prices, terms and conditions until they shall have given at least 18 hours notice of proposed changes and deviations as aforesaid."

The reporting activities of the defendants concern not only changes in the basis price, but all changes in the sales' conditions and terms. The present discussion which is concerned only with price reporting, sufficiently indicates the nature of defendants' system.

1. The price reporting system was worked out in its final form only about a year after the formation of the Institute. Certain points with respect to the earlier practices must be clarified before considering it in its final form.

(a) In February, 1928, the following provision was adopted by the directors; it appeared first in the Code issue of February 17, 1928 as an interpretation.

Three O'clock Notice.

Except to meet a competitive price already announced, the Institute recommends to its Members that they announce changes in price not later than three o'clock of [fol. 148] the day before the changed price becomes effective. *The first announcement of a change in price should be sent by telegram to the Executive Secretary, he to notify the other Members.*" (Italics mine.)

The Government contends that the italicized provision required that all changes in price be first announced to the Institute. The language is not clear. The Institute's Office Manager testified (R. 5120) that it meant merely that only the announcement of the refiner first to announce a change in price was to be relayed to the other members by the Institute; this appears to have been the early practice.

In support of its contention, however, the Government refers to the following memorandum found in American's files:

"Announcement of change in price, either an advance or decline, must be made before 3 P. M., to become effective at the opening of the market the following morning.

When change in price has been decided upon, and before making announcement to our brokers and the trade, copy of the change must be furnished, Judge Ballou." (Ex. 385-K.)

"However, unlike other memoranda in this series admittedly prepared by America's Sales Manager, the one

quoted did not carry his signature. With respect thereto he testified;

"I do not know who prepared it and with respect to the second paragraph which states * * * [that when a] change in price * * * has been decided upon and before making announcement to our brokers and the trade, copy * * * must be furnished Judge Ballou; that has never been done." (R. 5259-60.)

He, as well as several other refiners, testified emphatically that the actual practice has always been first to notify the trade through the various channels used prior to the Institute and then, the Institute. The evidence, in my judgment, establishes, that there was never any obligation to give the Institute the first notice of a change in price. The important requirement imposed upon the refiners was to make an [fol. 149] open announcement to the trade. In fact, California and Hawaii, with the possible exception of a brief period in the early days of the Institute, never exchanged any price information with the Institute.

I am inclined to accept defendants' explanation in this matter. In any event, in the next printing of the Code, November 26, 1928, it was expressly provided that the trade should be notified by the individual refiners before the Institute of a change in price and that the Institute should relay to all members not only the first announcement of a change, but all subsequent announcements. The latter practice has been adopted by the Executive Secretary on March 14, 1928. As defendants explain, this was done because the price change of that date was a complicated one and it was then found advisable to continue the practice in the interests of accuracy.

(b) It is charged too, that defendants were under an obligation to notify the Institute not only when they changed their prices, but also when, after a change had been announced by another member, they chose not to follow it. In support, the following minute from the Executive Committee meeting o March 6, 1928, is quoted:

"Executive Secretary expects all members of the Institute to give him immediate notice of what they do or decide not to do." (Ex. 21-26, pp. 29-30.)

Nothing in the record however, indicates that this procedure was followed. The Institute Office Manager testified that in its entire history, notification to the Institute of what a refiner decided not to do had occurred only one or two times. (R. 5122-3.)

(c) Complaint is made of the activities during its first six months in prohibiting what is known in the trade as "repricing", that is, giving the benefit of a price decline retroactively to contracts taken at a higher price. Usually this occurred when a decline was announced late in the day and was applied to all of that day's business. Defendants admit that during the first few months of the Institute, an attempt was made to prevent repricing as a violation of the Code requirement of openly announced prices and they assert that their "Three O'clock Rule" was drafted to prevent the practice. However, the practice was customary in the trade. The Institute rule encouraged buyers to hold off until after three o'clock awaiting a possible decline and thus caused a bunching of orders after 3 o'clock. In addi- [fol. 150] tion, the announcement of a decline to be effective the following day of course ended all business on the day of the announcement. Consequently, in August, 1928, the attempt to eliminate all repricing was abandoned; partial approval thereof as an "exception to open prices publicly announced" was given in the next printing of Code Interpretations, November, 1928, in the following terms:

"The custom of the trade permits giving the customer the benefit of the refiner's lowest price during the day, that is, a contract entered into or sugar delivered in the morning may be repriced at any lower price announced during the day."

Repricing has been practiced at least since August, 1928. Although expressly sanctioned only as to business of the day of the decline, refiners occasionally have repriced beyond that period. But the above quoted "Interpretation" was evidently intended to prevent this and must have had some effect in discouraging it.

2. Present practice.

Price reporting through the Institute was developed in its present form at least by the beginning of the second

year. It is, of course, an integral part of defendants plan that "sugar should be sold only upon open prices and terms publicly announced."

(a) The present form of the Three O'clock Notice Rule is as follows:

"Except to meet a competitive price already announced, the Institute recommends to its members that they announce changes in prices not later than 3:00 o'clock. Such timely announcement will enable a price change to receive wide publication through the evening and morning papers. It is, furthermore, in the interests of uniformity which will be appreciated by the trade."

[fol. 151] As to declines in price, its effect was to compel announcement thereof before 3:00 o'clock in the afternoon. Defendants insist that its sole purpose was to enable the price change to receive wide publication through evening as well as morning papers and the ticker service which stopped at 3 P. M. With respect to announcing price advances, the practice under the Institute pursuant to the "Rule" differed from that which had theretofore prevailed. The great bulk of sugar always was and is purchased on what is known in the trade as "moves", although very substantial quantities are, of course, sold from time to time apart from moves. A move occurs when a price advance is announced. Some times, prior to the Institute, an advance was announced to go into effect immediately, usually, however, to become effective at some future time. But regardless of the form of the announcement, some period of grace was always allowed during which sugar could be bought at the price prevailing before the advance. In order to obtain their sugar at the lower price, the trade, unless of course they felt that the move occurred at too high a price, would then enter into contracts covering their needs for at least the next 30 days.

But prior to the Institute, this period of grace allowed for purchasing at the old price was uncertain in duration. Sometimes it was very short, a matter of hours; some times sugar buyers who did not learn of the move in time, sent their orders in too late to buy at the old price Until the Three O'clock "Rule" was cast in its final form, it compelled a period of grace from 3 P. M. to the opening of business on the next day because its express language pro-

vided that changes in price should be made "not later than 3:00 o'clock of the day before the changed price becomes effective." Until the opening of business the day after the announcement buyers had been enabled to get the lower price. Early in 1929, the quoted language was de-
[fol. 152] leted from the provision. Why this was done is not apparent. Thereafter the price advance could have been made effective at once. But at this time the definite period of grace had doubtless become well established; in any event, refiners have not availed themselves of the Code privilege to effectuate an immediate advance. Price advances continued to be announced to become effective the following day or even later. There is no evidence that the refiners consulted with one another after an advance had been announced by one of them or that the grace period was in fact used by them, to persuade a reluctant member to follow the example set; and this, too, despite the business necessity of withdrawing an advance unless it were followed by all. The effects so far as the record reveals, of the Three O'clock "Rule" in and of itself, seems to have been advantageous to the trade in case of a price advance in that the uncertain period of grace has been replaced by a definite one.

(b) Other material Code interpretations covering price reporting at the time of suit, follow:

"Posting.

"Refiners' basis price of sugar should be kept posted, in accordance with the long established custom of the trade, upon their bulletin boards available to access by the trade. In addition, they should notify the trade of price changes in the manner customary previous to the formation of the Institute."

[fol. 153] Notification to the Institute.

(a) Price Changes;

"The Institute requests members before notifying the Institute of price changes to post or otherwise announce them in their customary manner and then to notify the Institute of action which has been taken."

Notification by Institute.

"Upon receipt of a price change notification the Executive Secretary will give the same to the news agencies in

New York which operate commercial tickers. He will also advise by telegram members of the Institute, the Domestic Sugar Bureau, and other distributors of refined sugar."

Defendants contend that these Code interpretations, except insofar as they make the Institute the clearing house for price changes, provide substantially for continuing the pre-Institute practice. The testimony of American's Sales Manager and of Revere's, Arbuckle's and California and Hawaiian's representatives is that price changes before the Institute were listed on the refiners' bulletin boards, brokers, customers and news agencies were notified, and frequently, as a courtesy, competitors would be telephoned, and that except for notifying the Institute, price changes, during the post-Institute period, have been similarly announced. They testified, too, that both before and since the Institute they have received information of the price changes of their competitors from their customers and brokers and from various news services. It appears to be unquestioned that before the Institute, general price changes were disseminated and became known to the entire trade very quickly.

[fol. 154] Defendants insist that the use of the Institute as a clearing house for price change information, had for its purpose, and resulted only in a wider and more accurate dissemination of the information. The Institute notified not only the members but also numerous news agencies and the ticker services. It is unquestioned that the price change data was circulated by the Institute without any comment.

But it is clear that the Institute price reporting system did effect important changes in the methods of announcing and quoting prices. The witnesses as to pre-Institute practice, except American's Sales Manager, represented the ethical refiners and testified to their practice. But in the case of the other refiners, a somewhat different situation appears to have prevailed. Gardiner, editor of the Willet and Gray sugar trade journal, a government witness, testified that the list prices which many of the refiners announced and which, as such, were published in the trade journal, were merely nominal quotations and bore no relation to the actual "selling bases" at which their sugar was sold. This is confirmed by the testimony of American's Vice Chairman and McCahan's Vice President. No witness has ex-

plained the reason for it. The published list prices and the "selling bases" of some of the unethical refiners, differed widely. The selling basis was the price at which they purported to sell; the secret concessions were from this basis. In the case of American, the selling basis was given widespread publicity through brokers and customers. In this connection, McCahan's Vice President testified:

[fol. 155] "If we have a soft market, and we sold yesterday to five customers at $5.00, and sold today to one at 4.90 and the market remained soft, and tomorrow we sell to two or three customers at 4.90, I would call that a change in the selling basis." (R. 10413.)

And the evidence indicates that the changes in "selling bases" were made from time to time without formal public announcement in advance of sale. Changes therein did, however, become known very quickly to the trade and to competitors; but frequently that knowledge would be obtained not through news agencies or published announcement; customers of a certain refiner would refuse to buy at his then price and would tell him that another refiner was quoting a lower price. All this, of course, is entirely apart from sales carrying secret concessions. It is thus clear that the practice of public announcement since the Institute differs considerably from the prior practice, at least with the unethical and as will hereinafter * appear, in some important respects with the ethical refiners. Of course, the actual adherence to the open price announcements which has very generally prevailed since the Institute, is vastly different from the prior departure therefrom through a very substantial number of arbitrary secret concession transactions, and other special arguments.

[fol. 156] V. Statistics

Government's charge, denied by defendants, with respect to the statistical services of the Institute, is that, while defendants exchanged the most intimate details of their business operations, they failed to supply essential information to the trade.

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*Pp. 91-92.

A distinguished economist, testifying for defendants, subscribed to the view that:

"Perfect competition requires a perfect knowledge of the state of the market," and, "A perfect market is a district small or large, in which there are many buyers and many sellers all so keenly on the alert *and so well acquainted with one another's affairs* that the price of a commodity is always practically the same for the whole of the district." (Italics mine.) (R. 10209-10.)

On cross-examination, he was asked and he answered as follows:

"Q. Does your truly competitive situation contemplate that the purchasing trade as well as the sellers shall have full information as to capacities and production, deliveries and stocks of the finished product on hand, and the like?

A. The more such information they would have the closer you would approach to the conditions of a free competitive market.

Q. In other words, you do not really have a freely and truly competitive market unless the purchasing trade as well as the selling trade have all of that information.

A. You have not perfect competition. You may have a good deal of approximation to it, but not perfect competition." (R. 10332.)

Defendants' assertion that they supplied the purchasing trade with all those items of information "necessary to place it on an equal footing with the refiners" is not sup-
[fol. 157] ported by the evidence.

I shall consider separately statistical matters relating to data (1) collected by the Institute (2) that as to which the Institute did not concern itself.

1. Most important among the Institute's statistical services exclusive of price and term reports are the following: (all reports were compiled chiefly from data supplied by defendant refiners.)

(a) Each week the Institute sent out an individual report to each refiner showing the total weekly melt (i. e. production), deliveries and stock on hand of all members and the percentage thereof of the refiner so notified.

(b) The Institute reported weekly the melt and deliveries for the week of each member as well as his cumulative total

melts and deliveries from the beginning of the year to the end of such week. Key letters were used to designate the several refiners; each refiner had a code of all designations.

(c) At the end of the contract period on each price move, a report or reports were sent out showing for each refiner the total undelivered and unspecified sugar on the contracts. Reports were also sent out showing by states the total amount of undelivered sugar for each refiner; here too, the key letters were used instead of names.

(d) Reports of capacities of the several refiners were circulated several times during the Institute period.

(e) An annual compilation of statistics collected by the Institute with analyses thereof was sent out.

The foregoing reports were furnished to each of the Institute members but to them alone.

(f) A quarterly statistical report was sent to Institute [fol. 158] members and a few others, chiefly representatives of off shore refiners.

(g) A weekly report showing total deliveries in each state for such week by all refiners but not by each of them, was sent to the Institute members, Hershey and its sales representative.

(h) Each month a report showing total deliveries by states of all refiners for the month, together with a comparison with the same in each of the four years immediately preceding and the same data for the year to the end of such month, was sent to the same parties.

(i) A weekly report showing by states with some subdivisions thereof total sugars on consignment at consignment points for all refiners but not for each of them, was sent to the same parties.

(j) A similar report showing in transit stocks was sent weekly to the same parties.

(k) Reports showing the amount of sugars moved into each state during the week by all the important differential routes [6] for refiners own account and separately at custom-

[6] That is, by water and combination water and rail routes carrying lower freight rate than all rail service.

ers' request together with some analyses thereof were sent to the same parties; some such reports were also sent to L. W. & P. Armstrong, representatives of an off shore refiner.

(l) A monthly report showing the total cane and beet sugar deliveries separately by states was sent to Institute members, the Domestic Sugar Bureau and several representatives of off shore refiners.

The only data disseminated to the trade generally were:

(a) Weekly statistics as to the total melt and total deliveries. These statistics were widely distributed through news agencies, banks, brokers, etc.

[fol. 159] (b) Monthly statistics of the total deliveries of all sugar, divided so as to show the amount of domestic cane, imported cane, and beet sugar, delivered during the period. These statistics were widely distributed through news agencies, banks, brokers, etc. (See Ex. 1-2.)

Data as to capacity of the several refineries were available to the public in substantially similar form to that obtained by the Institute, in an annual trade publication "Sugar Reference Book and Directory" and in less complete form in the annual Report of the American Sugar Refining Co.

Defendants point out, too, that the total refined stocks on hand could be computed by the simple method of subtracting from the total melt of each week the total deliveries during each week and as evidence of their good faith they call attention to their practice in recent years of continuing to supply statistics on melt and deliveries at a time when the trade could readily calculate therefrom how greatly refined stocks were increasing.

None of the other statistics, as defendants themselves state, were available to the trade from any source except the Institute.

In May, 1931, after the bill in this suit was filed, the Executive Vice-Secretary reported to an Executive Committee Meeting that a representative of "Facts About Sugar", a trade publication, had suggested "that it would be of benefit to the trade in general if the Institute would release to the trade more statistics than at present". A Directors' meeting thereafter voted to release combined

statistics on the total consumption of cane, beet, foreign and insular refined sugar by states, together with figures showing the per capita consumption of each state, for the years 1928, 1929 and 1930. (Ex. 21-26, pp. 649, 659.)

Defendants explain their failure to give additional statistics to the trade only by the suggestion in their brief but without support in the evidence, that the information relating to the consignment and the in transit stocks was [fol. 160] "of little or no interest to the trade generally". No explanation whatsoever is given for not making the other data available to the trade.

The refiners by thus circulating only among themselves certain collected information were thereby placed in an advantageous position with respect to purchasers. The purchaser's relative handicap is graphically revealed by reference to certain of defendants' exhibits. They show that data relating to total production and deliveries given to the trade, and the calculable stocks could have had only a limited significance for the individual purchaser and were even likely to mislead him. For such data reflect only the general situation for the country as a whole and for all the refiners. But the competitive set-ups in the several trade areas throughout the country differ widely. In no state do all of the refiners and in many of them, only a few offer substatial competition;[7] the business done by those competing in any trade area is not proportionate to their total sugar production (Ex. F-15). In the light of such facts, the vital character of the statistics which defendants did not reveal to the trade becomes apparent. The names of refiners competing in various areas, would of course be generally known. Data relating to production and deliveries of individual refiners, to deliveries by states, to consigned and in transit stocks for the several states, obviously would illuminate the situation in the several trade areas; but this was withheld from purchasers. While the refiner was thus informed with respect to the several areas

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[7] In 1927, there were three states in which only three defendant refiners delivered over 10,000 bags; five states, five; eight states, six; four states, seven; three states, eight; two states, nine; one state, ten; two states, eleven, and one state, thirteen. (Ex. H-15.) Figures for the eleven western states are not given.

in which he was interested, the customer knew the situation only with respect to the country as a whole.

[fol. 161] Defendants also obtained an advantage over the trade by keeping to themselves the data concerning the customers' unspecified and undelivered balances at the end of the 30 day contract period. Under the Institute regime, the refiners professed to compel customers to adhere to the contract terms of giving specifications for delivery and withdrawing sugar not later than 30 days after the contract was made. In fact, however, if it appeared after a "move" that it would be impracticable to enforce these terms, and the determination of that question depended in part at least upon what the statistics revealed, the Institute committee in charge of such matters sometimes recommended a later dead line. The more detailed facts concerning the enforcement of contracts and the question of the legality of concerted action in respect thereto are hereinafter * discussed. It is unnecessary to consider whether the Institute's collection of such data and its circulation only to members, would have involved unfair dealing with the trade, if each member had been expected to and had in fact used the information independently and not concertedly with the other members.

2. Complaint is made, too, of defendants' failure to collect and publish certain statistics. The contention is that if there is to be open competition, data from which demand for refined sugar might be calculated and that relating to defendants' stocks of raws on hand and to the prices paid therefor, ought to be collected and disseminated.

During the early days of the Institute, efforts made to obtain from the members information as to new business entered each week was unsuccessful because three of the refiners, National, American, and Arbuckle, who together did well over 50% of the business of all defendants, refused to report thereon. Such figures, as the Institute's statistical expert testified, were necessary to estimate "the demand". He further stated: "I always considered that the most valuable statistical information we could get." (R. 8651-2.)

[fol. 162] The reason given for not collecting data as to the stocks of raws was that, had such information become

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* Pp. 96-7.

known generally, raw sugar sellers would have been placed in a position to "squeeze" on "spot sales" any refiner whose stock of raws happened to be low; further, that this information would be of little value in any event and that the only important information with respect to supplies of raws would be that of the world market situation which was readily available from many sources. Justification for the failure to collect and disseminate information as to the raw sugar transactions of the several refiners is sought on the ground that this had always been kept entirely secret; the refiners did not reveal it even to one another. The evidence shows that about 50% of all raw sugar purchased was bought in secret transactions rather than in open market. The refiners did not want their competitors to know the "trades" and concessions that they were getting. Moreover, as Place of McCahan testified, if a refiner is buying sugar,

"he does not want to bull the market on himself * * * so he tried to hold the transaction confidential until he has bought all the sugar that he wants." (R. 8174.)

The witness Gardiner, editor of Willett & Gray, testified, too, that if it were known among the buyers of refined that the refiners were buying raw below its then open market quotation, it might to some extent cause them to stop buying because of their belief that a weak raw market indicated an early decline in refined. (R. 401.)

It thus appears that various factors entered into the Institute's failure to collect data relating to these matters but chiefly the unexplained hostility of individual refiners and the possibility of jeopardizing the refiners' position with respect to sellers of raw sugar. But the evidence indicates that none of the information except that relating to demand was really important; in any event, defendants' failure to concern themselves is no indication of bad faith or unfair dealing with the trade. In failing to collect such data, defendants have neither sought nor obtained any advantage, if it may be deemed an advantage, over purchasers, which they did not in fact possess individually prior to the Institute.

[fol. 163] VI. Boycott of Brokers and Warehousemen

Most of defendants' sales are negotiated through brokers; they receive their commission from the refiners. Some are

exclusively sugar, others general food brokers. During the period Jan. 1928-Dec. 1931, members of the Institute used 1360 brokers.

Much of defendants' sugar is delivered in interior points from consignment; that is, from sugar stored by the refiner in an interior warehouse owned by parties other than a defendant, and thence shipped against contracts with customers in the area tributary to such warehouse. Until withdrawn from consignment, the sugar belongs to the refiner. For the storage service, the warehouseman receives compensation from the refiner. Some warehouses store only sugar, others a great variety of food-stuffs and at times other goods. During the period Jan. 1928-Dec. 1931, Institute members used 1483 warehouses.

Prior to the Institute, a broker and a warehouseman were frequently one, and/or also a merchant or other sugar user.

Soon after the creation of the Institute, defendants adopted against such combination of occupations by a broker, a warehouseman, or a merchandiser or other purchaser of sugar, a definite policy expressed generally in Code 3 (d), 3 (e), and 5. Defendants virtually admit concerted action in requiring an election of only one of these business activities with a complete cessation of each of the others, and in refusing to deal with those who disobeyed. The reasons for adopting this policy in the light of the general factual background of the situation, the means taken to effectuate it and the effects of and necessity, if any therefor, will now be considered.

1. A combination of distribution functions in a single concern facilitated the grant by a refiner of secret concessions, difficult of detection. Thus a customer whom a refiner wished to favor, might be paid what was called brokerage commissions although in fact no brokerage service was performed; or a refiner might place sugar with and pay so-called warehouse fees to a wholesale sugar merchant, although in fact the customer performed no real storage service but held the sugar on his own premises solely for his own use. A dummy warehouse corporation might even be set up in order the better to conceal the concession.

[fol. 164] This so-called storage as well as bona fide storage with a customer also enabled him to sell the sugar to his own trade or otherwise to use it without reporting to the refiner the time of withdrawal from consignment for the

customer's own account; the customer might then await a drop in the market and report the withdrawal as of such later time, thus obtaining the benefit of the lower price. By delaying reports, he might also obtain an extension of credit terms. Brokers who stored sugar might by a similar manipulation of reports, use fluctuations in the market to favor their own customers; they might also divert sugar directly to customers' premises and charge refiners for unearned storage.

The evidence indicates that such action by broker-warehouse and jobber-warehouse concerns was at times authorized or acquiesced in by the "unethical" refiners as a means of conferring valuable secret concessions. That defendants appreciated their own partial blame for such abuses is plain. Thus, the sales manager of Arbuckle writing to Edgar in explanation of defendants' policy against combination of brokerage, warehousing and jobbing, said:

"Were the Resolution [which embodied the policy] to require any justification, a cursory examination into recent trade practices (*for which even some refiners are blamable*), would quickly discover the reason for the rule." (Ex. 185.) (Italics mine.)

It is in my judgment clear (defendants do not say it in so many words but intimate as much in briefs and argument) that one very real motive for adopting the Code rules was to assure the refiners, distrustful of one another, that no one of them could successfully use any of these or similar devices. A like motive actuated defendants in other matters. Thus in arguing against long term contracts, they virtually admit that they disapproved of them because of a fear that some refiners would use them as a means of granting arbitrary concessions. (Fact Brief, p. 343.)

Other "evils" which the Code rules sought to eliminate were the fraudulent practices of delaying withdrawal reports and charging unearned storage without refiners' concent. Such practices were made possible largely by such a combination of activities, and, in fact, were often indulged in by those who combined two or more of the several businesses. In all of these matters it is difficult to determine which of the [fol. 165] secret concessions were obtained with refiners'

consent and which by the dishonest acts. While, because of this and other obvious difficulties of proof, it is impossible precisely to measure the extent of such fraudulent practices, the evidence indicates that it was substantial.

In another respect, too, defendants insist that combination of functions necessarily led to unfair practices. Thus they assert that while the broker's duty is to sell his principal's sugar to as many customers as possible, his adverse interest if he was also a dealer, would lead him to violate this obligation. Where distribution functions are combined, there clearly is opportunity for such double dealing, which some brokers and warehousemen may at times seize. Brokers and warehousemen do have special duties toward the refiners; the latter depend upon them to obtain customers, to check consigned stocks, etc. The value to the refiner of one engaged in two or more of the activities may frequently be impaired. But, on the other hand, a principal may permit his agent to have an adverse interest and such a business arrangement may well be advantageous to both. Ordinarily the only requirements for its legality are the principal's consent to and the agent's disclosure of his adverse interest. In the sale and distribution of sugar prior to the Institute, such arrangements were common. Despite the known adverse interest, such brokers and warehousemen were employed.

The evidence affirmatively shows, moreover, that such arrangements, from the refiners' viewpoint, were not infrequently entirely successful; that concerns in substantial numbers which combined distribution functions, maintained entire honesty and good faith in their dealings with the refiners. Such concerns were not averse to seeking and accepting special favors from the refiners, but this, of itself, of course cannot be deemed unfair or dishonest toward those refiners who granted them.

I deem it unnecessary to review in detail the evidence in this respect. Defendants' brief virtually admits and the correspondence with one another and with brokers, warehousemen and jobbers shows that honest dealing by such distribution agencies was not uncommon, indeed that it was perhaps about as usual as dishonesty.

[fol. 166] Another alleged evil in the combination of functions was that one who dealt with refiners in more than one capacity might obtain an advantage over a competitor who did not or could not do this. For example, to quote from

defendants' brief, "the result of a broker merchandising sugar is that through the brokerage which he receives he is placed in a preferred position over the ordinary sugar merchant" (Fact Brief, p. 106) and "The payment of storage charges to certain customers necessarily gives them an advantage over customers who are not paid storage and makes the net price of sugar to such customers lower than to the other customers" (Fact Brief, p. 109). The increased income received from two or more activities might enable the recipient to out-sell a competitor. To what extent this in fact occurred does not appear. The situation is confused by the fact that at the same time that advantage might naturally accrue because of greater activity, actual advantages were conferred by secret concessions. Whether if secret concessions alone had been eliminated, the combination of functions would generally have resulted in advantage or in economies in the distribution of sugar is on this record largely speculative. But it is clear that the possibility of advantage and economies is present in the situation. And in my judgment it is probable here, as in other aspects of the case it is certain, that defendants' real fear was that such function combination endangered the price uniformity[8] that they aimed to maintain. By com- [fol. 167] pelling brokers, warehousemen and customers to follow only a single occupation, the refiners aimed also to free themselves from the pressure theretofore exerted upon them to obtain reduced prices or other favors in compensation for the inability or unwillingness to combine occupations.

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[8] As will hereinafter appear, there is no substantial evidence of direct action by the refiners to preserve uniformity among themselves in the basis price which each of them quoted to the trade. Apart from secret concessions, such uniformity prevailed generally before and after the Institute, because defendants' sugar was, but for exceptional instances, and is a standardized product. However, most of defendants' activities since the Institute have been designed to preserve what the government charges as "uniformity in price structure"; this objective was accomplished by preventing combination of functions and by prohibiting or limiting all special terms so that sugar should be sold at the basis price only, with the usual differentials for grades and packages.

Defendants' position in this connection is somewhat inconsistent. While urging that to permit some to acquire a preferred position is to discriminate against the others, they contend that "only if it is contrary to the Anti-Trust laws for the refiners to deal on the same basis with their customers *similarly situated* • • • can it be said that they were not justified and acting reasonably in adopting the recommendation against storing with customers." Fact Brief, p. 125 (italics mine). But a customer who combines two or more functions as some did, is not situated similarly to one pursuing only a single occupation.

It may be true, as defendants urge, that it is impossible to store with all or with any considerable number of their customers and that therefore some must necessarily be favored if such storage be allowed. The guiding motive, however, in the selection was often solely to grant a secret concession. Defendants might concertedly have agreed to prevent customers from reestablishing the pre-Institute wrongful devices. They might thereby have eliminated such practices while at the same time refraining from concerted agreement with respect to their policy toward the many bona fide warehouses of customers. No secret concession is conferred if refiners openly store with such warehouses; no discrimination is practiced because only some customers have warehouses. If such customer-warehouse concerns thereby obtain an advantage, it is an honest one, due to the larger scope of their activities. And as will also presently appear, there is good reason to believe that the dishonesty which did occur could have been checked without concertedly applying coercive tactics to all.

Defendants also claim that the pre-Institute situation was leading to monopolies among the distribution agencies. It may well be that the pre-Institute secret concession practice might have led to monopoly, but defendants have not proved that it did or would so result. Whether apart from [fol. 168] secret concessions, the possible advantage to those combining functions might cause elimination of the others is on this record entirely speculative. Such elimination, however, if it occurred as a result of the economics in distribution effected through combination of functions, would be the natural result of fair competition as between economically unequal competitors.

Distribution agencies that combined functions, performed in various ways a valuabe service in the industry. At some places, particularly in the southeast, the warehouse accommodations were insufficient without brokers' warehouses; their use was thus essential if consigned stocks were to be kept at such points. (At the first Institute meeting in Jan. 1928, Savannah, a southern refiner evidently insisted upon special treatment with respect to the application of the code rule against storing with customers, Ex. 21-26 p. 7.) This situation was not entirely confined to this particular section; thus, in the city of Sherman, Texas, the only warehouse suitable for sugar storage belonged to a sugar purchaser, a candy company. And it is scarcely open to question that Edgar's chain of warehouses located in Michigan, Indiana, Ohio, and New York performed a valuable service to the trade. Defendants cite the Edgar activities as a striking illustration of the vices made possible through combination of functions. It is entirely clear that the vast size and ramified activities of the Edgar organization led to some irregularities in dealings with refiners. But the evidence also shows that when refiners called attention thereto, an honest effort was usually made to correct them, even though it does indicate, too, that some of the Edgar representatives were not overly scrupulous in dealing with refiners. But here again it is scarcely possible to determine where concessionary advantages obtained by Edgar with refiners' consent leave off and those taken without consent begin. It is clear, too, that by its very structure, the Edgar organization offered advantages to the consuming trade. In addition to its warehouses, it maintained a corporation operating a chain of sugar stores at various points in Michigan, Indiana, Ohio, New York, West Virginia and Pennsylvania. Economies effected through its organization enabled it to give its retail store customers and others, advantages in their sugar purchases. These Edgar sugar stores were "a constant source of irritation to the Institute" (R. 1754), undoubtedly because their operation led to a reduction in the price of sugar to consumers and thereby prevented uniformity in price structure. Under pressure from the Institute, Edgar closed out his interest in these stores.

[fol. 169] 2. At special meetings of directors and members on May 2nd, 1929, defendants' policy against combina-

tion of functions among distribution agencies was given its final form. The several refiners at once advised their brokers, warehouses and customers affected by the ruling, that they must elect one and only one of these business activities for their future dealings on behalf of or with the refiners. In the following months, machinery was set up within the Institute to make that effective.

An enforcement committee was created; its members were high officials from a number of the refiners. Usually it met weekly, but sometimes more often. In the year following the May 2nd resolution, this committee was largely concerned, as the minutes of its meetings disclose, with enforcing the policy. When a concern was believed to combine functions, the committee reviewed the evidence and determined whether or not it should be "disqualified" from acting as a broker or warehouseman. In aid of the committee, the Institute employed investigators whose function it was to obtain evidence where combination was suspected. If individual refiners discovered similar infractions, they advised the Institute which in turn circulated the information.

Each refiner submitted to the Institute the lists of its brokers and warehouses, which were then circulated among all the refiners. Defendants insist that "The only significance of a name appearing on the list is that the broker or warehouse is being used at the moment by some member. The only significance of a name not being on the list is that it does not happen to be in use at the moment." (Fact Brief, p. 132.) But clearly the purpose of thus circulating the lists was to aid in the enforcement of the policy against combination of functions. When brokers or warehouses were "disqualified," they would as a matter of course be dropped from the lists of the respective refiners, unless the disqualification was disregarded; this, however, rarely if ever occurred. If refiners wished to use a warehouse not on the list of any refiner, they were required to notify the Institute of their intention "so that" as a representative of one defendant put it, "other Institute members can voice any objection they may have" (Ex. 400-D-1) and so that the Institute might have opportunity to investigate the proposed warehouse. At first, only 48 hour notice had to be given; the period was extended from time to time, until [fol. 170] finally six days notice was required.

In an opinion so voluminous, it would serve no useful purpose to discuss fully the conclusive evidence of defendants' definite understanding that refiners should refuse to deal with a broker, warehouseman or customer who admittedly or by the Committee's finding was acting for any of them in other than the one selected capacity. Thus a broker-warehouse concern could not deal as a broker with one refiner and as a warehouseman with another. Moreover, he was confined to the one selected activity not only in dealing with all refiners but also with all others in the sugar trade, such as beet and offshore interests. The evidence demonstrates that defendants' activities in this connection were designed to and did effect the distribution of practically all sugar sold in the United States including beet and offshore sugar. Cooperation of the Domestic Sugar Bureau, offshore interests, and Edgar was sought and obtained. If a broker stored sugar belonging even to "non-members * * * it was the opinion of the Enforcement Committee that these facts * * * would result in the automatic suspension of the brokerage concern involved as a broker for any Institute member." (Ex. 27, p. 7.) In July, 1929, the Institute's Executive Secretary, writing to Hershey re storage in a certain warehouse, said:

"I trust you will see fit not to leave this one instance in the entire country, where any distributor of cane or beet sugar is still using a broker's warehouse with all its attendant evils." (Ex. 389-R.)

Other evidence likewise demonstrates conclusively that the refiners adhered quite rigidly to their obligation. Thus in Nov. 1931, the Institute writing to a refiner about his failure to abide by an Executive Committee[9] ruling relating to a broker, said:

"It stands on our records as one of the rare instances in which members have deliberately and openly disregarded the findings of the Executive Committee in such matters." (Ex. 436.)

[fol. 171] Certain other facts are illuminating in revealing the arbitrary manner in which defendants' policy was made

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[9] The Executive Committee took over the Enforcement Committee's functions in 1930.

effective. Defendants assert that they were "ready to hear any complaint" about "the Institute's findings and to rescind or modify any unfavorable finding upon good reason shown". (Fact Brief, p. 137.) But under the Institute rules and practice, in order to be reinstated after disqualification, application had to be made by an Institute member. The disqualified concern itself had no standing.

Confronted by special cases where even the possibilities of the "evils" of which defendants complain were so remote as to be practically non-existent, defendants made no effort to devise a system for correcting abuses which would not involve such serious injustice. In its brief, plaintiff has discussed a number of such cases; another is mentioned in argument. There must have been more. These were cases both of customer-warehouse and broker-jobber concerns. A Tampa, Florida, broker was president of and owned stock in a grocery merchandising concern whose business because of the freight situation, was necessarily conducted entirely outside of the territory in which the broker operated. The Enforcement Committee's opinion was that this state of facts warranted no exceptional treatment. (Ex. 27, p. 1.) It is typical of the cases cited by plaintiff. While they may be, as defendants insist, extreme cases, nevertheless they involved important and substantial interests in the distribution of sugar. Only complete disregard of the effects of their policy upon third parties can explain defendants' failure to make some substantial effort to devise a policy less harsh to such concerns.

In another respect, too, defendants seem to have been disregardful of the hardships which they caused. A sudden election of but one of several activities naturally disrupted business set-ups of long standing. The severance could not well have been and was not effectuated without hardship. Judge Ballou expressed defendants' attitude in a letter of June, 1929:

"In all matters of this kind refiners must conduct their business in accordance with average business experience, and the fact that some honest merchants may suffer inconvenience cannot be weighed against the necessity for rules based upon the accumulated experience of the practical working of a certain set of conditions." (Ex. 314-A.)

[fol. 172] While "average business experience" may have demonstrated evils in the pre-Institute situation requiring

cure, defendants went much beyond this. That a concern which combined two or more of such functions may have thereby acquired a preferred position is not, as will appear* from the discussion of the law, an evil justifying the concerted action which defendants took. They could readily have ended the secret concessions originated by them. The Institute staff, the individual members and others in the trade were constantly on the alert to find grants of secret concessions and in this they were not unsuccessful. Formal and informal investigations were made and effective action taken to persuade wayward refiners to adhere to the code provisions against such concessions. Defendants have not shown that these activities would not have sufficed reasonably to prevent secret concessions. Defendants assert as the basis of their insistence on prohibition of such function combination as the only remedy for the fraudulent practices of brokers and warehousemen that they had no way of discovering specific instances of delayed reports of withdrawals from warehouses and of charges for unearned storage. They urge that if the prohibition were effective, then the independent warehouseman could usually be relied on to report withdrawals and storage items accurately. While some such specific frauds might well escape detection, many of them clearly could have been discovered by proper concerted action. Indeed, the sales manager for National (upon whose testimony defendants rely in many matters) went further; he stated in one of his letters:

"All refiners have in their own office the ability to detect any irregularities which might be resorted to, either intentionally or unintentionally, by a broker." (Ex. 408-W).

Defendants, themselves, in giving reasons why it was, in their view, impossible effectively to check up on the wrongful practices, provide a clue to what might have been done in dealing with the problem, without resort to coercive tactics. They state in their brief:

"The two largest refiners who did most of the storing with customers employed traveling auditors to check consigned stocks and to detect instances of delayed billing. In many instances such detections were made and the facts [fol. 173] reported to the refiner. It was the auditors' busi-

*Pp. 169-170.

ness to prevent, in so far as possible, such irregularities and by their periodic checks and reports let it be known to sugar purchasers that such irregularities would not be tolerated. But what chance did the auditors have to detect the irregularities in most instances, or the refiner to protect himself against imposition and fraud? The auditors could only check the stocks once or twice a year. The rest of the time the purchaser was in complete control of the situation. No one was there representing the refiner to watch each and every delivery made by the customer to himself. No amount of checking could verify the dates upon which the purchaser took the sugar from himself as warehouseman. The only way the auditors could detect any irregularity was by periodically making a physical count of the stock against the refiner's records of the stock that should be on hand, and if there was a shortage he would know that billing was being delayed. But then the purchaser would always have the way out of saying the discrepancy represented sugar which was just taken out last night and he had not had a chance to report it." (Defendants' Fact Brief, pp. 119-120.)

At another point they say that brokers

"by juggling their records * * * insured themselves against detection and upon the periodical visits of the traveling auditors they explained any stock discrepancies with the statement that the sugar had been withdrawn that morning or the night before. Sometimes they were caught and in those instances they were reported to the refiner. But here again the refiners had no satisfactory means of ascertaining the facts * * *" (Fact Brief, p. 126.)

Thus it appears that some of the refiners were neither inexperienced nor entirely unsuccessful in checking-up on brokers and warehousemen. And there is reason to doubt that pre-Institute investigations were carried on by the "uneithical" refiners in more than a half hearted way. One fraud more or less would be of little moment when these refiners were secretly permitting similar practices. If all frauds could not be detected, at least it should have been possible to determine by investigations which brokers and which warehousemen were worthy of confidence. More-[fol. 174] over had the collective effort of all of the refiners been directed to this end through the efficient Institute, it

cannot be doubted that far greater success would have resulted than individual refiners attained in pre-Institute days. That such collective effort might well be successful where individual effort had theretofore been a partial failure is indicated by the familiar trade association activities in collecting credit information. Somewhat as credit risks are determined, the trustworthiness of brokers and warehousemen might have been established. It might well have been necessary to devise an elaborate system of investigations, inspections and circulation of data, such as those employed in the Cement case* to deal with fraudulent practices. It might even have been necessary to give publicity to evidence of irregularity. The record indicates that such a device might have been effective in checking frauds. Thus, when the vice-president of American told a representative of Edgar that he felt justified in exposing certain irregularities which American's auditors had discovered, it is quite clear that the Edgar representative feared the effect of such a step when he "asked" that "such action" be not taken and said that "he would look into the matter". not taken and said that "he would look into the matter". (R. 9716.) Moreover, Edgar did make adjustments to cover irregularities found by auditors.

Such investigations, inspections, circulation of data and the like, if they had proved necessary, certainly should not have taxed unduly either the finances, the efficiency or the ingenuity of the Institute. The record abundantly reveals the Institute's unlimited resources in these respects. The means actually adopted by defendants to deal with this problem necessitated very extensive and expensive activities on their part. Those of the Enforcement Committee have already been adverted to. High officials of the refiners themselves at times visited various cities to attend to such matters. Investigators were employed by the Institute; in one year, 1930, expenses for investigations were listed by the Institute at nearly $30,000. Up to December 1931, some 86 brokers and 135 warehouses were thus "investigated". In addition, individual refiners conducted their own less exhaustive investigations. These bare facts give but a scant view of the extent of defendants' activities.

The conclusion is irresistable that had defendants used the same effort in discovering and dealing with actual

*268 U. S. 588 (1925).

fraudulent practices as they used in abolishing all function combinations, such frauds might well have been practically eliminated.

[fol. 175] The moral effect of the pre-Institute secret concession system on brokers and warehousemen while not specifically proven, must have been considerable. Some refiners, dominant figures in the industry, demonstrated to their agents that honesty was not deemed by them to be the best policy, thus setting an example that their brokers and warehousemen might well be expected to follow.

Defendants, in addition to the actions hereinabove described, also agreed (1) upon the commissions to be paid brokers and (2) the contracts which they required brokers and warehousemen to sign.

(1) The justification alleged for concertedly maintaining fixed brokerage rates appears to be that the rates paid prior to the Institute never varied and that those subsequently adopted involved an entirely fair increase. There is no substantial evidence that the commissions agreed upon were not fair. But the minutes of a Directors' meeting at which this matter was considered at length, clearly show that the actual reason for adopting the agreement was to prevent a growing competition in bidding for brokers' services. (Ex. 21-26, p. 345.) Commissions did not vary prior to the Institute, probably because other inducements were then offered brokers by individual refiners, such as storing sugar with them. When such inducements were prohibited by the Institute's Code, competition in bidding for services if permitted, would naturally result in varying commissions.

(2) The Institute recommended that all refiners should obtain from each broker and from each warehouseman an agreement in the form recommended by the Institute. The evidence is clear that the refiners understood that they were not to deal with any broker or warehouseman who did not sign such an agreement. The evidence also shows beyond question that the Institute checked upon the several refiners and saw to it that this understanding was carried out.

The essential provisions of the warhouse agreement were:

[fol. 176] "If the Warehouse Company shall at any time during the life of this Agreement pay or concede to any customer of the refiner any amount or consideration of

value whatsoever (whether by way of commission, rebates, reduction in rates for storage, remission or reduction of rent, or reduction of other charges for services whatsoever) not commensurate with the consideration received in exchange therefor by the Warehouse Company from such customer, the charges to the Refiner for storage hereunder shall be reduced by such amount or the value of such consideration. Such amount or the value of such consideration paid or conceded by the Warehouse Company to such customer in violation of the foregoing shall immediately become due and payable by the Warehouse Company to the Refiner, and at the option of the Refiner may be either deducted from any charges thereafter becoming due to the Warehouse Company from the Refiner or may be collected by the Refiner in an action against the Warehouse Company. Any amount or consideration of value paid or conceded by the Warehouse Company to any customer of the Refiner shall be presumptive evidence that such amount or consideration is not commensurate with the consideration given by such customer to the Warehouse Company, unless such amount or consideration of value paid or conceded by the Warehouse Company to such Customer shall be paid or conceded by the Warehouse Company at a rate open to every other tenant of the Warehouse Company." (Ex. B-6.)

The brokers' agreement which had to be sworn to by the broker under oath, was quite a lengthy document imposing upon the broker generally an obligation to uphold the Code and the interpretations thereunder. Among the important undertakings of the broker were the following:

"That he will carefully peruse all letters, circulars or bulletins received by him containing interpretations of the Code of Ethics of the Sugar Institute or regulations thereunder, and will conscientiously uphold the spirit and letter of the same in all transactions, except when otherwise specifically authorized by the refiner;

"That the broker will not give, pay, rebate or divert all or any part of the money or commissions paid by the refiner for services rendered in the purchase or sale of sugar, syrup and/or other products either directly or indirectly by [fol. 177] any means or subterfuge of any nature whatsoever to the factor ordering or to the purchaser or to any of

their employees or to any firm, corporation, or individual designated by or connected with them." (Ex. D-6.)

Defendants contend that the brokers' pledge was merely a statement of the brokers' functions and duties as generally understood in the trade. Obviously, however, it went much further in requiring general support of the Institute and its Code.

VII. Defendants' Activities Relating to Transportation

A. Code 3(c) and Delivered Prices

Very substantial parts of the briefs and much of the oral argument were devoted to discussion of the issues in the case relating to these matters. The controversy in this respect centers chiefly about the question of what defendants have actually done during the Institute period.

It is manifestly impracticable to discuss in full the numerous relevant specific incidents. The facts are frequently bitterly disputed; an outline of the important ones will suffice, in my judgment, to make clear the bases of my conclusions.

1. Pre-Institute Situation.

In describing the general background prior to the Institute, I paraphrase at times the statements in defendants' brief. The cost of transporting defendants' sugar from the several seaboard refining points to interior trade areas is a substantial element in the ultimate cost of sugar to purchasers. As the basis f.o.b. refinery price of the several refiners was usually the same or varied only slightly, if sugar had in fact been sold f.o.b. refinery in all cases, leaving to the purchaser the payment of the actual cost of transportation, the sales of each refinery would have been practically restricted to the territory in which its freight costs were as low as or lower than those of all other refineries. In fact, however, the refiners sold in larger areas by paying or absorbing so much of the transportation charges as was necessary to meet the competition of refiners having lower transportation costs.

[fol. 178] The freight applications of the refiners selling at a given point have always been the same at any given time, because any refiner who failed to meet a lower freight application, would for all practical purposes, lose the

market. The amounts absorbed by the several refiners thus differ in accordance with the actual freight charges from their respective refineries.

The extent to which the refiners sold in territory beyond that of their lowest actual freight costs varied, dependent principally on individual policy in the matter of absorptions. Some refiners would absorb no more than 10¢ to 15¢ per hundred pounds and normally even less; others like the California refiners would absorb as high as 30¢. This they could afford to do because of certain advantages in purchasing raw.

The custom of the trade was to quote sugar f.o.b. refinery. The refiner usually shipped freight prepaid and billed the customer for the basis price plus a fixed amount, usually called the refiner's "ruling freight basis" or "freight application" for the particular destination. If the refiner shipped collect instead of prepaid, he would invoice the customer for the basis price plus his freight application to destination and deduct the amount of freight actually paid by the customer; the result would thus be the same.

Prior to the formation of the Institute refiners never refused customers the privilege of purchasing f.o.b. refinery, except in two areas; in these, refiners sold only on a delivered price basis.

(1) In Central Freight Association territory[10] to which the freight rate from Baltimore was generally 1¢ per hundred pounds under Philadelphia, which was in turn 2¢ under New York, the Philadelphia rate was generally used. The only Baltimore refinery was built by American in 1922; prior thereto, the Philadelphia rate, as the then lowest, had determined the basis in Central Freight Association territory and this practice continued. American, by refus- [fol. 179] ing to sell f.o.b. Baltimore while actually shipping from there and charging the Philadelphia rate, could effect a freight pick up of 1¢. The other Philadelphia and New York refineries also continued to use the Philadelphia rate so that this practice was established long before the organization of the Institute.

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[10] The territory east of the Mississippi River, north of the Ohio River and west of a line from Buffalo to Pittsburgh.

(2) In territory to which the Texas refiners had *lower* rates than New Orleans, the freight applications were based upon the New Orleans rates. The Texas refiners refused to sell f.o.b., thus effecting a pick up. As defense counsel stated during the trial, "for many years the Texas refineries substantially lived on this freight pick-up." (R. 581-a.) Comparison of the profit statements of these companies with statements of their freight pick-up indicates the truth of the remark. (Exs. F-17, E-17.) This practice had prevailed at least since 1917.

On the other hand, the middle western and western beet sugar producers, who generally sold on a delivered price basis using the cane sugar refiners' freight applications, made a substantial profit on transportation, since their own actual freight rates were generally much lower than the lowest cane refiner's rate. This was a practice of long standing in the industry.

The freight situation was complicated in certain markets which were served by differential routes, that is routes which were slower than the standard all-rail routes and involved water transportation. Because of the disadvantages incident to the differential routes, such as their seasonal character, slower transportation than by all-rail routes, and added risks of damage due to transshipment, the rates via these routes were lower than the all-rail rates. The most important of these routes served various areas in the Middle West from the Atlantic Seaboard refineries and in the Mississippi Valley and tributary areas from the Gulf refineries.

In common with other phases of the industry, freight applications were affected by the growth of secret concessions, sometimes given in terms of transportation charges. The customer would be given the benefit either of a cheaper differential rate though the sugar had not thus moved or of a rate to another than the actual destination. Such [fol. 180] practices were equivalent to a price concession. With the elimination, after the Institute, of these and other secret concessions, the prior ostensible stability of the freight rate situation ended. Refiners were deprived of their former competitive devices. Probably as a result, competition developed in the freight applications themselves; similar developments have been noted in respect to other practices in the industry. Such developments, with

the abolition of the unsatisfactory and unfair pre-Institute system, would naturally be expected. But the story of the post-Institute transportation system is to a large extent although not entirely, a story of the concerted steps taken by defendants to suppress this new competition.

The most serious transportation problem which confronted the founders of the Institute, apart from secret concessions, arose because of the differential routes. It is apparent from the list of the most important,[11] that they

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[11] Exhibit L-4 represents graphically these differential routes. The routes are (figures on rates are taken from Exs. J-5, L-4):

(a) Ocean and Rail route via Norfolk, available to N. Y., Philadelphia and Baltimore refineries, serves points in many midwestern states. Rates: e.g. N. Y.—Chicago, April 1929, 51½¢ per 100 lbs. (cf. with all rail, 56½¢); Philadelphia-Chicago, 49½¢ (cf. with all rail, 54½¢).

(b) Rail and lake route, available to same refineries, serves points in many midwestern states. Rates: e. g. N. Y.-Chicago, April, 1929, 51½¢ per 100 lbs.; Philadelphia-Chicago, 49½¢.

(c) Canal and lake, available to N. Y. and Philadelphia refineries, serves points in N. Y. and in many western states. Rates: e.g. N. Y.-Chicago, April 1929, varied from 29½¢ to 36¢ per 100 lbs.; Philadelphia-Chicago, 37¢.

(d) National Despatch, available to N. Y. and Boston refineries, serves points in many midwestern states. Rates: e.g. N. Y.-Chicago, April, 1929, 51½¢ per 100 lbs., Boston-Chicago Sept. 1931, 54½¢.

(e) C. A. T. line, available to N. Y. and Boston refineries, serves points in many midwestern states. Rates: e.g. N. Y.-Chicago, April 1929, 47½¢ per 100 lbs.: Boston-Chicago, Sept. 1931, 47½¢.

(f) Barge services out of New Orleans, via Mississippi and Ohio rivers and by rail to interior points provide differential service chiefly throughout the south and middle western states. Rates: e.g. New Orleans-Chicago, April 1929, 44¢ (c. f. all rail rate of 54¢).

[fol. 181] offered opportunities for transportation substantially cheaper than was possible by all-rail service. A difference of 5¢ or even less per 100 lbs. in the cost of sugar was a substantial item.

Taking advantage of the situation, sugar merchants at interior points purchased large quantities f.o.b. refinery for shipment by the differential routes. Refiners, too, in shipping to consignment points used the differential routes extensively. The figures for the pre-Institute period are not available, but the evidence indicates that such differential shipments must have been very substantial. Although the situation has changed somewhat since the Institute, the incomplete figures made available for the latter period, give some idea of the volume of sugar moving in this way.

Thus a government exhibit reveals that all sugar moved into Wisconsin, Illinois, Indiana and Michigan in 1928 [12] on refiners' own account was shipped over differential route (Ex. 528.) Refiners maintained consigned stocks in all these states. Complete figures on volume of shipments by all refiners over various routes from the Eastern seaboard are not available. In the case of American, however, there are figures to show that of nearly 3,000,000 bags of sugar delivered between April 1929 and May 1931 in Detroit, Cleveland and Chicago, over 30% moved by eastern differential routes. (Ex. K-5) Another exhibit showing volume of shipments on refiners' account over differential routes out of New Orleans to states served thereby—twenty-one in all—shows very substantial shipments for the period 1929-1931. The totals, 1929, 2,556,111 bags; 1930, 2,511,743; 1931, 4,756,643, represent a substantial percentage of all defendants' sugar delivered in the United States in those

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(g) Barge service out of New Orleans up Warrior River and other waters and thence inland by rail. R. 6012-15. This service available to points in Alabama, Kentucky, Tennessee, and Indiana. Saving over all rail varies, thus rates in Alabama range 6-7¢ less than all-rail (R. 6013).

[12] Nearly 15% of all sugar delivered in U. S. in 1928 went to these states (Ex. S-7). Well over half of this was defendants; (Ex. E-15) of this much must have moved ex-consignment.

years.[13] For the same period, total sugar moved by the [fol. 182] same routes into these twenty-one states at customer's request, were: 1929, 5,205,148 bags; 1930, 3,603,744; 1931, 1,533,688. (Ex. 454.)

Defendants state that "Prior to the Institute, as a general rule, it was only the customer who used a differential service and took the disadvantages incident thereto who paid the differential rate over the particular route, instead of the refiners' regular freight application which applied to all-rail service and deliveries from consignment. (Fact Brief, 178.) Defendants qualify the statement to this extent: First, traditionally in the industry, sugar delivered at Great Lake ports regardless of how it actually moved, was sold during the season of open navigation on the Philadelphia lake and rail rate; second, during 1926 and 1927, sugar had been sold in the Warrior River area [14] at a barge rate regardless of how it actually moved. (Fact Brief, pp. 178, 217.)

The two general areas affected by these breakdowns were as the evidence plainly shows, of vital importance; in them, competition among the refiners was especially keen; the most important steps taken by the refiners in transportation matters were addressed chiefly to the problem in these areas.

The problem was this: At the lake ports and in the Warrior River area, refiners from different points competed One, Savannah, had access to no differential routes into these territories. The differential routes available to others differed in rates and efficiency of service. Thus the situation of New Orleans, Philadelphia and New York refineries differed in these respects. Refiners accessible to routes combining low rates and reasonably efficient service naturally were inclined to promote the sales advantage of their position. Thus a New Orleans refiner might be able to take from Savannah an Alabama customer by showing the advantage in using barge transportation which was cheaper than the rail route from Savannah. To meet this competition, Savannah would give rail shipments or shipments out of consignment to Alabama customers and charge only the

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[13] Total deliveries by defendants in the U. S. during this period, see note 2, supra.

[14] Alabama, Tennessee, Kentucky and parts of Indiana.

barge rate from New Orleans as if the shipment had actually been made therefrom, absorbing the difference. Such a step by Savannah would compel the New Orleans refiner, [fol. 183] if he wished to keep the customer, to quote still more favorable terms because obviously, a rail shipment or delivery out of consignment by Savannah provided more rapid service than the New Orleans barge service. To meet the competition, therefore, the New Orleans refiner might give the Alabama customer actual delivery by rail or ex-consignment and charge only the barge rate. Or he might ship by barge and give to the customer as a sort of bonus the difference between the barge and rail rate.

There was a somewhat similar situation at the Great Lake ports where Eastern, New Orleans and California refiners competed and where many differential routes with varying rates and service served further to complicate the set-up.

In a word, there was a tendency in these territories for freight applications for all sugar, regardless of how it actually moved, to be broken down to the level of the cheapest service carrying a substantial traffic. This tendency increased after the Institute was formed.

Before considering the steps taken by defendants to prevent such breakdowns, it is necessary to explain more fully the nature of ex-consignment service. Defendants state "a delivery from consignme * * * had always been classed with the all-rail shipment, since the service to the buyer was even faster and *the cost to the refiner usually equal to or greater than all-rail.*" (Fact Brief, p. 184.) (Italics mine.)

This statement does not give an accurate picture of the actual situation. It is not shown that the cost of consignment service was "usually equal or greater than all-rail." Defendants rely on testimony of American's traffic manager. He stated:

"The cost to the refiner of consignment service was in most cases higher than the differential—well, in all cases it was higher *than the actual cost of handling via the differential route,* because a delivery out of consignment meant we had to take the warehousing charges, interest on our money, and fire insurance and things of that character. So that it actually cost the refiner in excess of the freight rate that they paid." (R. 6008.) (Italics mine.)

[fol. 184] It is plain that this testimony does not support defendants' statement. The testimony simply gives the obvious fact that the total cost of consignment service is necessarily higher than the transportation charges to consignment points, because of warehouse charges, etc. Other evidence shows quite plainly that the total of freight charges by differential routes *plus* these additional costs was frequently substantially less than all-rail rates. Thus defendants estimate the cost of consignment service at 10¢ per 100 lbs.[16] bags; New York refiners could ship to Chicago at a rate as much as 27¼¢ per hundred less than the rail rate. Examples might be multiplied, but this suffices to illustrate the opportunities open to the refiners in varying degrees for making deliveries ex-consignment substantially below the cost of all-rail service.

Defendants show that with the exception of Texas and Imperial the refiners have suffered net losses on freight absorptions, even without including the additional cost of consignment service, in each year of the period 1927-1931 (Ex. F-17, as qualified by R. 10034 et seq.) [17] But these figures cover the entire country. The statement reveals nothing with respect to particular trade areas. In it, freight pick-ups effected at some points or in some transactions would merely offset absorptions elsewhere. The important fact is that refiners could effect substantial freight pick-ups at many points even in selling out of consignment stocks if the selling price included the all-rail rate for sugar actually moved into consignment by differential routes. And even if they sold ex-consignment and charged for transportation at a differential rate,

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[16] This figure may be accepted as approximately correct although of course the cost would and did vary in different localities.

[17] The figures for C. & H., whose freight losses amounted to more than 70% of the losses for the industry as a whole during each year of the period 1926-1930, are not comparable to those for other refiners as C. & H. had a special arrangement with producers of the raws that it purchased, in effect to assume freight absorptions. Freight losses for the industry as a whole including C. & H. ranged from $2,326,855.37 to $3,974,674.44 per annum during the period 1926-1931. (ExF-17.)

they might still effect a pick-up by actually shipping to the consignment point by a still cheaper differential route, e.g., by shipping canal and lake New York to Chicago at 29¼¢ to 36¢ and charging rail and lake rate of 51½¢ or even New Orleans barge rate of 44¢.

[fol. 185] 2. The Post-Institute Situation.

The government's chief complaint of defendants' activities in these matters relates to their actual and alleged steps to prevent (1) "sale" of transportation below "cost" and, (2) sale of sugar f.o.b.

(1) The effort to prevent the "sale" of transportation below "cost" engaged the attention of the Institute during the first year. At the pre-Institute organization meetings, there was discussion of a proposal:

"That the Institute shall incorporate into its Code of Ethics or Trade Practices for the industry a provision to the effect that the rates over differential routes shall not be used on deliveries made from consignments, and that such rates shall be applicable only on direct shipments made over differential routes at customer's request." (Ex. V-2, Meeting 12/29/27.)

The discussion evidently resulted in approval of the proposal as it was incorporated in Code paragraph 3(c). Defendants' policy was amplified in the following Code interpretation:

"1. General Use of Differential Routes

Absorbing freight means the selling of transportation at less than cost, which is unsound in principle and necessarily throws an undue burden on the consumers at and near the primary markets. It is realized, however, that the use of differential rates on consignments cannot be prevented in all markets at all times. The customer has the right to ship over differential routes from refinery points, taking the slower service at his own cost and risk of the market during the transit period. If the quantity thus shipped is in fact inconsiderable, it should be ignored rather than break down the freight application actually paid on the preponderating quantity of sugar. If, however, sugar can be and is shipped by customers in this manner in suffi-

cient quantity to break the market at the destination point and to render it difficult for refiners to sell their own sugar on the all-rail application, then this competition must necessarily be met. It is a question of fact in every instance, and the Executive Secretary should be fully advised, before sugar actually paying a higher rate is sold on the differential rate, of the necessity of this departure from the strict letter of the Code of Ethics."

[fol. 186] Defense counsel offers as the ground of the Institute's belief in the uneconomic results of selling transportation at less than cost; that it throws an undue burden on consumers at markets in which transportation is on a cost basis. As defendants appreciate, if this theory were acted on, there would be no absorptions. In practice, however, no effort was made to go so far; the principle was applied solely to prevent quotation of a differential rate on an all-rail or ex-consignment delivery.

It is entirely clear that the discrimination involved in absorption did not give defendants the least concern. Their whole purpose was to prevent the breakdown of the freight structure, chiefly in the Great Lakes and Warrior River areas.

During the early months of the Institute, desperate efforts were made by the Executive Secretary and those refiners that profited by the principle, to make it effective. But other refiners, chiefly Savannah, McCahan, and the Californians, found themselves thereby losing business in certain territories. By the summer of 1928, despite all efforts to prevent it, the code principle had been openly violated in the Warrior River and middle western areas. It was also quite clear by that time that because of the opposition of these refiners the enforcement of this rule must eventually meet with at least partial failure in those territories.

The Government devotes much of its brief to a discussion of alleged agreements to support the principle; this chiefly concerns activities in the spring of 1928. Defendants deny any agreement. They contend that the Institute merely recommended the principle and urged the economic wisdom of following it, leaving to refiners complete freedom of decision. The evidence plainly demonstrates, however, that at this time defendants went much further. Agreements were, in fact, made but they were not entirely

effective and, as already indicated, by the summer of the Institute's first year, the code principle had been disregarded to some extent in the crucial areas. The principle of Code 3 (c) was effective, however, in respect at least to one important matter. McCahan, the Philadelphia refiner, announced in May, 1928, that its freight application in certain middle west areas would be the New Orleans barge rate. "At the insistent request [of] Judge Ballou" McCahan withdrew the announcement the same day it was made, (Ex. 457-T). At a special meeting of the Executive Committee on the following day, Pennsylvania and Mc- [fol. 187] Cahan were "prevailed upon", "to continue indefinitely the withdrawal of barge rate application western territory", Ex. 457-U. The freight application in this territory did break down during the spring and summer of 1928 to the Philadelphia rail and lake rate; it was not broken down, however, to the lower New Orleans barge rate applications, to which McCahan had sought to break it. It is clear that this further break down was obstructed through the efforts of the Institute.

In this connection should be noted the use of the statistics on shipments over differential routes, described in the general discussion of statistics. Their purpose, of course, was to illuminate the question suggested in the Code Interpretation, whether or not sugar was being shipped by customers via differential routes in sufficient quantity to break the market at destination point. With such information at hand, the refiner could tell whether or not market conditions in areas served by differential routes really necessitated revising his current freight charge policy. It is likewise clear that the statistics were in practice used for this purpose. Moreover, the statistics were useful, whether refiners were acting independently or in concert, in establishing freight applications. Concealment of such data would naturally place customers at a disadvantage, for if unaware of the true conditions, they could not know when they might reasonably insist upon a breakdown in freight charges. It is thus apparent that with respect to this data, as well as the other statistics fully discussed hereinabove, defendants dealt unfairly with the trade.

After the failure of the Institute policy in the summer of 1928, but slight effort, so far as the record shows, was made to enforce Code 3 (c). The evidence shows that it had become a dead letter at least by the fall of 1929, and

probably much earlier. But it was not until September 1930, that the code interpretation was finally formally rescinded.

(2) But transportation problems still loomed large in the minds of defendants and in the activities of the Institute. The most important were finally solved by means of a system of delivered prices with denial of the privilege of purchases f. o. b. refinery. The Government's insistence and defendants' denial that this system was developed and/or maintained by defendants through concerted action raise the most bitterly disputed issues in the case.
[fol. 188] Concurrently with the attempt in the spring and summer of 1928 to make Code 3 (c) and the interpretation thereof effective, there grew up among the defendants a definite sentiment in favor of a scheme of delivered prices in the Warrior River and Great Lakes area. Place, Vice-president of McCahan, was the most vigorous exponent of a delivered price system. As early as March 1928, reporting to McCahan's President the results of a meeting of Institute members, he wrote:

"A meeting was called at the Institute on March 29th to discuss means of maintaining the 'all rail' rate into Chicago and other western markets. Both Mr. Fox [a McCahan broker] and I believed that the purpose of this meeting was to agree to sell in these markets on a uniform 'delivered' quotation (based on the 'all rail' rate), refusing to sell on an f. o. b. basis for shipment over all differential routes. This is the system employed by the Beet Sugar Manufacturers.

"The establishment of this system would have lost to us the selling advantage of the 'lake and rail' route but we would have been perfectly willing to make this sacrifice for the sake of a stabilized market which would have been a great advantage to those refiners not enjoying differential routes. However, pending consultation with legal authority, Judge Ballou felt that such an agreement might not be enforceable." (Ex. 457 C.)

During the months following the writing of this letter, Place advocated the principle of such a delivered price scheme on every possible occasion.

Judge Ballou himself was interested in the project. In May, 1928, he wrote the Domestic Sugar Bureau inquiring

about the practice of the beet manufacturers in this respect and clearly indicated that what he was interested in was a delivered price system with denial of the privilege of purchasing f. o. b. refinery. (Ex. 457-R.) Minutes of the Directors' meeting for June, 1928, contain the following:

"There was a discussion as to the advisability of selling sugar at a delivered price instead of upon seaboard basis as is now the practice. *It was the consensus of opinion that* [fol. 189] *this would be a desirable change* but the Executive Secretary stated that he would require more time to consider the legal aspects of such practice" (Ex. 21-26 p. 68.) (Italics mine.)

All refiners were represented at the meeting except Arbuckle, C. & H. and Western; the latter two were not then members of the Institute. The representatives were in practically every case the President, Vice-President or other leading executive or official.

A month later, counsel submitted an opinion as to the legality of such a scheme.[18]

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[18] Material parts of the opinion follow: "We understand that this delivered price would in practically every instance be the present base price, plus rail freight to the point of delivery, and that except as to localities served both by water and rail there would be no difference between the delivered price quoted and the price which the customer is now required to pay.

The practical effect, therefore, of carrying out any such recommendation if made by the Institute would be to raise in those communities served both by rail and water, the price of that part of the sugar which the customer may now have shipped to him by water. This would apply, we understand to two considerable territories, that served by the Warrior River Barge Line and that served by lake and rail.

We do not believe that the Institute should make such a recommendation, and we believe that it would not be lawful for the members of the Institute to enter into any understanding or agreement, open or implied, to put into effect a delivered price.

The question is not one of the right of the refiners to use a delivered price, or to change from their present

[fol. 190] This opinion was submitted to a meeting of the Executive Committee in July, 1928. At this meeting, important representatives, including Place, of the following refiners were present: National, McCahan, Arbuckle, Colonial, American, Pennsylvania, Federal. (Ex. 21-26, p. 87.)

Despite this advice, Place continued to advocate adoption of delivered prices. Thus on November 19, 1928, he wrote Judge Ballou:

"To my mind, the only way to avoid this action [breakdown of middle west freight rates to the New Orleans barge rate which it was feared might occur] is to develop a 'delivered price' system of selling, based on Mr. Cody's [sales manager of Arbuckle] freight zoning plan." (Ex. 473.)

The freight zoning plan had been discussed at a Directors' Meeting November 16, at which Place was recorded present. A minute of that meeting states:

"The possibility of freight applications based upon a system of freight zones was discussed. It was stated that such a system was already in effect with respect to alcohol, the production points of which correspond closely to those of sugar, and that it was being applied in other industries. The executive officers of the Institute were authorized to ask the assistance of the various traffic managers in making a study of the possibilities along this line." (Ex. 21-26, pp. 148-149.)

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method of quotation to another. Such is perfectly lawful. It is the agreement or understanding to change from a present method of quotation to another method of quotation which would be unlawful if thereby it results in a raise of price particularly if that raise is substantial, or affects any large part of the community. And we believe that concerted action taken by the refiners as the result of a recommendation of the Institute would be construed as an agreement or an understanding. There would be nothing unlawful in any refiner voluntarily, but on his own initiative, changing the basis of his quotations and sales. But if the example of this refiner would be followed immediately by others, such action might appear to have been taken in concert." Ex. U-4.

The zoning plan was a favorite project of the Arbuckle firm. Goetzinger, General Manager of that firm, testified:

"It was absolutely the antithesis of it [delivered prices] * * * the Zoning plan contemplates a common price in every market in the zone. The [delivered] prices announced at the lake ports named a separate price." (R. 6898.)

However, according to Taylor's testimony, he was advised by Judge Ballou "that he thought the question fell in the same category as delivered prices, that we would have no legal privilege to do anything about it." (R. 6461.) Nevertheless, as late as January, 1929, Place and [fol. 191] Moog (of Godchaux) discussed the question, (Ex. 457 W-2,) Moog advising Place that he felt such a plan for a zone price basis "with all sugar sold on a delivered basis" was the only solution of the problem of differential routes. Moog wrote to Ballou of the conversation, but Ballou replied February 5, 1929, that

"With regard to a zone or delivered price * * * I regret to say that I have not been able to find a satisfactory solution of the legal aspect." (Ex. 457 x-2.)

A month later, however, Place was still engaged in his advocacy of delivered prices. On March 5, he wrote Moog:

"Of course, I am heartily in sympathy with your thought of quoting delivered prices. It is my opinion that such a practice can and must eventually be arrived at by refiners." (Ex. 474.)

Two days later, at an Executive Committee Meeting, as the minutes reveal, "there was a general discussion of * * * the legal aspects of delivered prices." Representatives of National, Pennsylvania, American, Federal (later Spreckles), McCahan, Arbuckle, Savannah, C & H. and Great Western, a beet manufacturer, as well as the executive head of the Domestic Sugar Bureau were present.

At its meeting of March 28, 1929, according to the minutes,

"There was a general discussion as to the effect of the differential shipments upon delivered prices and of the economic situation caused by the existence of differential

routes which were carrying only a fraction of the total volume of sugar but enough to cause disturbance and discrimination in various markets on account of the resulting inequalities in prices at destination markets." (Ex. 21-26, p. 226.)

I accept the explanation of defendants' witnesses that this latter reference, "delivered prices" was not used to indicate a denial of the privilege to purchase f. o. b. refinery but simply as a destination price. However, I think it clear beyond doubt that the discussion of the "legal aspects of delivered prices" in the meeting of March 7th referred to such prices enforced by a refusal to sell f. o. b. refinery.

[fol. 192] The foregoing discussion has presented the important evidence of defendants' activities relative to delivered prices prior to the first actual announcement of the delivered price schedule on April 29, 1929. It reveals, in my judgment, that through contact with one another under Institute auspices, (1) defendants became familiar with the possibilities of a delivered price scheme, (2) their sentiment was crystallized in favor of such a scheme as a solution of their transportation problems, (3) they continued to concern themselves at their meetings in some degree with the question of delivered prices despite counsel's advice. The evidence shows, too, that defendants throughout the entire period covered thereby were greatly troubled about the transportation situation and the instability thereof in the crucial areas, caused by the tendency for freight applications to be depressed for all classes of deliveries to the lowest differential rate carrying a substantial traffic into the territory.

During April, 1929, a series of events occurred which broke down freight rates in the Great Lakes area to new low levels. Defendants thus describe these events: Arbuckle with its refinery in Brooklyn, had failed in 1928 to develop business by the canal and lake all-water service from the east, a service most advantageous to New York refiners. This was by far the cheapest service available to canal and lake ports and was not matched by the routes available to the Philadelphia, New Orleans and California refiners and the beet sugar producers, competing at the same points, or some of them. As a result of Arbuckle's

failure to develop business by the all-water route, it was itself suffering from the water shipments of its three local competitors, American, National and Federal. It studied the matter during the winter of 1928-9, while navigation was closed, and in the spring of 1929 determined to break the freight applications to the lowest rates available to anyone, the all-water rates, irrespective of routing.

Meanwhile, two of the Eastern refiners, in March and April, 1929, quoted reduced rates at certain lake ports without open announcement. Moreover, Edgar was causing uncertainty because he had tied up the most desirable boats. The Institute sought, defendants state, to learn what Edgar's space was costing him and have him openly announce his freight rate quotations for the coming season, but without success.

[fol. 193] On April 22nd, Great Western a beet sugar producer, openly cut the freight application at Chicago and Milwaukee to water rate figures, and was immediately followed by the two California refiners. Other refiners selling in those markets, with the exception of Arbuckle, followed this announcement. On April 24th, Arbuckle consummated its own plan by announcing new freight applications for nine points, all canal and lake ports except Cincinnati. The Arbuckle rates radically reduced the then freight applications at those points. Pennsylvania and McCahan on April 25th and 26th followed Arbuckle's announcement and extended it to deliveries from consignment, so that the new freight applications now applied to all classes of service.

On April 25th, Rudolph Spreckles, then President of Federal as well as a director and later president of the Institute, sent the following circular letter to all members of the Institute under the letterhead of the Federal Co.

"Members of the Sugar Institute.

GENTLEMEN:

It appears obvious that in view of developments during the past few days that the spirit of at least some of the members of the Institute is such that there is little hope of carrying out its purposes—in face of the recent creation of a committee to study situations which have caused trouble in the marketing of sugar, a much worse condition has been precipitated prior to allowing your committee a reasonable

opportunity to consider the problems involved and to make recommendations for their correction.

Terms and conditions openly announced, which clearly break down the entire selling structure, are to be deplored. Unless all the members are wholeheartedly determined to cooperate with their fellow members in bettering marketing conditions and each is willing to discontinue discriminatory practices, in the interest of the industry as a whole, there can be no useful purpose served by The Sugar Institute, Inc.

I had hoped that the refiners who organized the Institute had, because of past experience, resolved to cooperate and [fol. 194] build up a constructive method of doing business. The idea that refiners would persist in practices which are indefensable in principle and destructive of orderly marketing of sugar, must either be definitely overcome or we may as well close the doors of The Institute. Ex. 257.

American, although it met Great Western's, did not meet Arbuckle's announcement. Instead, on April 29, 1929, it announced that it would sell at the important lake ports as well as some other nearby points at delivered prices only and would not sell f. o. b. refinery. The delivered prices announced were considerably higher than the break-down terms put into effect by other refiners during the preceding few days. The other interested refiners immediately followed substantially American's announcement.

Within a few days thereafter, freight rate applications had become stabilized at the important Great Lakes ports. The then application at Chicago was 49½¢ per 100 pounds, slightly lower than the all rail rate but substantially more than the rate by several differential routes. See note 11 supra. The Cleveland application was 36¢; Detroit 39¢. While these applications were slightly lower than the all-rail rate, they, too, were considerably higher than the rates by some differential routes. During the delivered price period, as one customer testified, he could have shipped sugar to his place of business in Cleveland by barge for 13¢ under refiner's freight application. (R. 3129.) Another stated that at one time during this period refiners were actually shipping to Chicago at 28¢ per 100 pounds and charging an application of 51¢. (R. 1121.) At Green Bay, Wisconsin, the prepaid delivered price quoted by refiners

at one time amounted to 56.2¢ per 100 pound-. But for the refusal to allow purchases f. o. b. refinery, a customer in Green Bay could have transported sugar from the refinery by water for about 18¢ less per 100 pound-. (See R. 752, 756.) It is unnecessary to multiply examples. It suffices to say that refiners' freight applications in the Great Lakes territory were substantially higher than actual freight rates over differential routes.

The Government contends that the inference of agreement an dconcerted action in putting delivered prices into effect is clearly to be drawn from the foregoing facts. Defendants insist that there was no agreement.

Spreckels' letter they explain as follows:

[fol. 195] "It is plain that this is the outburst of a refiner who had himself been hurt, and is not a declaration of the Institute * * * Spreckels was, together with American and National, one of the three refiners that had used the water routes and benefited by the sales advantage to them which the difference in the water and rail rates afforded. But this advantage had been lost by the action of Great Western and Arbuckle in reducing the freight applications to the level of the differential rates. It was clearly as a lament because of this situation rather than a plea for, or even suggestion of, delivered prices that this letter was written." (Fact Brief, p. 216.)

They refer to testimony of a representative group of refiners' officials, in which it is stated that each refiner acted entirely independently in the matter of delivered prices. In explaining how and why he put delivered prices into effect, Abbott, who determined American's policy, (he was then its General Counsel and later became its President) testified that when he learned of Arbuckle's announcement "I started to do a lot of thinking". (R. 6613.) He then concluded that a delivered price system was the only solution. He continued:

"I locked this thing first in the bosom of my own mind or conscience, and over the weekend, at my home in the country, after studying the various rates that I could use—I had some 15 rates, I think, any one of which could have been used to name a delivered price to certain of these markets, I selected the one which I thought was fair and prepared what I thought was a fair announcement for the

American Sugar Refining Company to adopt as its selling policy in these markets.

"I had, up to that time, talked to no one in my own organization about it. I talked to no one outside of my own organization about it, but in view of the fact that it was a new departure for the company and involved a rather substantial question of policy, in view of the fact that I was only the general counsel for the company at that time, although I was a director of the Institute, I thought that the matter should be passed on by one of my superiors and I [fol. 196] presented the whole matter to the chairman of our company on Sunday afternoon, April 28th * * * I told him I believed that the company, as a matter of policy should put out this announcement on the opening of business the next morning, without saying anything to anybody, even in our own organization about it.

"He acquiesced in that conclusion. He was not a transportation man, taking my recommendations as to the rates, as far as the policy was, he acquiesced in my recommendation, and on Monday morning, I came to the office and went to the general sales manager and told him to have that announcement * * * put * * * out in the regular way." (R. 6616-17.)

When asked whether he consulted with anybody connected with the Institute on this matter, he testified that he did not except that he "may have talked this over with Judge Ballou in passing", "in some conversation on some other subject this was brought up as an incidental matter". Such discussion, he testified, was months previous and the witness did not recall any such discussions as having occurred "more than once, or maybe twice". (R. 6619, as corrected at R. 6632-34.)

Defendants insist that American's action and the action of its competitors in following it, resulted not from agreement, combination, or concert but from a "competitive struggle". If the foregoing evidence were all that the Government had presented, I should nevertheless be inclined to find against defendants in this matter despite defendants' testimony. True, there is no evidence of an express agreement pursuant to which the defendants acted. But, as the Supreme Court said in Eastern States Retail Lumber Dealers' Assoc. v. U. S., 234 U. S. 600, at 612:

"It is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done. * * *"

See, too, Ballard Oil Terminal Corp. v. Mexican Petroleum Corp., 28 Fed. (2d) 91, 98 (C. C. A. 1, 1928); American Live Stock Comm. v. U. S., 28 Fed. (2d) 63, 66 (D. C. Okl., 1928, Kenyon, C. J., Williams and Cotteral D. J.) reversed on other grounds, 279 U. S. 435 (1929); Farmers' Livestock Comm. v. U. S., 54 Fed. (2d) 375 (D. C. Ill. 1931).

[fol. 197] In the present case, under Institute auspices, the desirability of a system of delivered prices as a solution of the industry's transportation problem was developed and sentiment of the members in favor of such a system was cleared; thereafter, despite legal advice to the contrary, the scheme was advocated by individual refiners and to some extent the project was kept alive in Institute meetings and discussed at a time when it was apparent that the transportation problem would soon become acute.

With the situation thus primed, it required only some spark to set the scheme in operation. I cannot accept defendants' explanation of Spreckels' letter. The document, revealing its purpose only too plainly, indicates, too, that Spreckels was speaking not entirely as President of Spreckels but also as an official of the Institute. Somewhat similar exhortation has evoked the condemnation of the Supreme Court in American Column & Lumber Co. v. U. S., 257 U. S. 377 (1921). While there is no direct evidence that Spreckels was urging a system of delivered prices, it is not unreasonable to infer that such a letter would naturally stimulate the adoption of the one system generally recognized as a solution of the troubles of which he complained.

It is difficult to accept the testimony of defendants' witnesses that they acted independently in following American's announcement. There is some direct evidence that refiners deemed the Institute responsible for the inauguration of the delivered prices in the Great Lakes territory. Texas, in a circular letter May 7th, 1929, signed by the sales manager and sent to its brokers, made certain an-

nouncements respecting Institute policy toward combination of the activities of brokers, warehousemen and customers, and significantly concluded:

"We consider the recent results of *the Chicago rate situation,* together with the requirements now being put before us, as the strongest evidence of the appreciation of the refiners of the need and necessity of the Institute and its code of Ethics to protect the profits of the sugar refiner." (Ex. 391-U.) (Italics mine.)

In a sense, each refiner may have formed his own judgment, but each was already tutored under Institute auspices to know what was highly desirable in solving the transportation problem. The judgment of each inevitably, though perhaps not consciously, must have been influenced [fol. 198] by the knowledge obtained through Institute activities that all the refiners were agreed as to the wisdom, from their point of view, of delivered prices. It was a judgment which must have been influenced, at a crucial moment, by the strong letter sent out by one of the important figures in the industry and Institute.[19] Individual conduct so plainly influenced and directed by collective activities and the authority of one who spoke at least in part as a representative of the Institute, cannot be deemed independent in any true sense. I should therefore be inclined to hold on this evidence that defendants acted concertedly in instituting the system of delivered prices in the Great Lakes area. But there is direct evidence, which in my judgment, makes it clear that even if delivered prices as originally announced were not the result of concerted action, the system was maintained through such action.

Before considering this evidence, it should be noted that in December, 1929, following an announcement by Godchaux, delivered prices were put into effect at points in the Warrior River area. For some time thereafter, purchasers at these points could buy sugar only on the basis of a delivered price in which the New Orleans, Savannah or Philadelphia rail rate to destination was charged (depending on which was lowest to any given point) despite the fact that the Warrior River Barge route provided a substantially

[19] The president of C. & H. spoke of Spreckels as "the founder of the Institute." See Ex. 442-S, p. 8.

cheaper service. I deem it unnecessary to review in detail the facts with respect to this matter. It suffices to say that the method employed in inaugurating delivered prices in the Warrior River territory substantially parallels that in the Great Lakes region.

In discussing the evidence of concerted maintenance of delivered prices, the Government enumerates five charges:

a. That defendants, acting through the Institute, sought and obtained the assurance of the important offshore interests that they would adhere to the delivered price system. In support of this charge, it relies on certain correspondence exchanged between offshore interests and the Institute. In October and November, 1929, L. W. & P. Armstrong, a brokerage house representing an offshore refiner [fol. 199] was complaining to the Institute that its chief competitors, brokers representing other offshore interests, were not living up to the code, that therefore Armstrong would have to change its own policy which theretofore had been one of strict adherence to Institute principles and practice, "and meet competition as they found it." Ex. 343.

With Executive Committee authorization, the Executive Vice-Secretary set about obtaining cooperation from the offshore interests in "Open Price Announcements" (Ex. 21-26, p. 339). The evidence shows that the complete success of any Institute plan or practice depended upon obtaining cooperation of the offshore interests for not only did these interests offer substantial competition to one another but their sugar competed in many trade areas with defendants' sugar. On November 29, 1929, Armstrong, the staunch supporter of the Institute, had written to it suggesting the form of assurances which should be sought from the other offshore brokers. The letter stated in part:

"We suggest that the following letter be given by any outside party promising full cooperation in connection with the sale of refined sugars:

*'We will * * * follow refiners' * * * announcements made in connection with quoting sugars on a freight prepaid basis only to certain points * * *'*". (Ex. P. 6.) (Italics mine.)

Obviously, pursuant to this letter, the Executive Vice-Secretary wrote identical letters to the brokerage firms of Lamborn and Lowry, which stated in part:

"We would also like you to tell us that you will quote sugars only on a delivered price basis to such points as are being generally sold on this basis. *This latter is not an Institute matter but an item of importance to all parties concerned.*" (Exs. 343, 324.) (Italics mine.)

Lowry replied in part:

"In selling out of town points we use the same prepaid basis as is used by all other refiners and it has not been our practice to sell sugar f.o.b." (Ex. 343A.)

Lamborn replied:

[fol. 200] "Your letter • • • has • • • been given unusual consideration by the writer [Lamborn's President] and our vice-presidents • • • Mr. Ody Lamborn and the writer discussed the matter at great length with you on December 2nd • • •

We mutually analyzed with you each clause of your letter and in principle, I feel sure you agree that we are in general sympathy with its purport.

• • • • • • •

"Lamborn & Company, Inc. have never sold at other than the delivered price basis in those markets which the refining members of the Institute have publicly announced as delivered price markets." (Ex. 324B.)

Plainly, the reasonable inference from this series of letters is that the Institute was seeking assurance that the offshore sugar would be sold on a delivered price basis. From this the conclusion would of course follow, since the Institute represented the refiners, that they were acting concertedly in maintaining the delivered price system. In an effort to avoid this inference and conclusion, the Executive Vice-Secretary testified that his letter was simply designed to obtain in written form, assurances which he had already obtained orally from Lamborn and Lowry, but which in oral form did not satisfy Armstrong; that he was not interested in whether the offshore interests sold on a delivered price basis; that he was interested solely in their openly announcing whatever terms they were selling on; that in conversation with and letters to these interests he intended only to obtain assurances that they would sell on open terms, not that they would follow refiners' terms.

The documents themselves are entirely inconsistent with this explanation, as the quoted excerpts as well as the general tenor of the letters plainly show. As the Government points out, if the Executive Vice-Secretary had been interested only in open announcement he surely would not have included the sentence italicized by me. Defendants themselves have emphasized the Institute's interest in open announcements as the most vital of all Institute matters. Moreover, it is entirely clear that the offshore interests believed that their adherence to refiners' delivered price policy and not open announcement was the important thing. Armstrong's letter, already referred to, makes this plain. Later in July, 1930, Armstrong wrote to the Institute:

[fol. 201] "We have a dispute with Eavey Company of Richmond, Indiana, relative to the proper freight application to shipments to that point. We * * * would ask that you please investigate and confirm to us the freight basis charged * * * by members of your Institute." (Ex. 369.)

To this the Institute replied:

"On * * * the dates mentioned in your letter, Richmond was on a delivered price basis." (Ex. 369A.)

What Armstrong was interested in was in following the refiners' terms. The Institute must have appreciated this from the letter. Lowry, a government witness, when cross-examined, stated that it was his "understanding" that the Institute "made a ruling prohibiting * * * sugar from being sold f. o. b." (R. 575.) Even though he may have been wrong in believing that there was anything quite as formal as a "ruling", at least his impression that the defendants were jointly responsible for delivered prices is clear. Lamborn, too, clearly believed that the Institute was interested in adherence to delivered price policy. In complaining to the Institute in January, 1930, that H. H. Pike & Co., Hershey's representative, had departed from Institute principles, Lamborn wrote in part as follows:

"In your letter to us of November 30th, you incorporated the following paragraph:

"'We would also like you to tell us that you will quote sugars only on delivered price basis to such points as are being generally sold on this basis * * *.'

* * * * * * *

"We assume that on or about November 30th, 1929, you forwarded to H. H. Pike & Company, Inc., a questionnaire similar to [letter of Nov. 30th] * * * sent us. We further assume that H. H. Pike & Company with reference to delivered price markets, indicated to you that they would adhere to the delivered price basis in the markets where refiners generally sold at such a basis. If our assumption in either instance is incorrect, we would appreciate your so advising us." (Ex. 325.)

[fol. 202] There is no evidence that defendants ever took any definite steps to disabuse the offshore interests of the impression which they certainly had and which defendants now contend was erroneous. This fact confirms the correctness of the inference that the Institute was not interested itself merely in "open announcements" but actively sought and obtained assurance that the offshore interests would adhere to delivered prices.

Moreover, although open announcement is stressed by defendants as the Institute's most vital policy, there is other evidence that it was interested in having the offshore refiners maintain an "open policy" with the Institute and with one another rather than with the public. Thus on October 25, 1929, Taylor, who testified that in connection with the correspondence hereinabove referred to, he was interested only in open announcements, wrote to Armstrong as follows:

"Since conferring with you over the telephone, I have been in touch with both Lamborn and Lowry, who express complete willingness to cooperate with us in the matter of open price announcements, *or some substitute for that practice that may be suitable to all parties concerned.* They point out that a number and variety of open price announcements might be a greater disturbing factor than the present system, and suggest the advisability of some clearance, for the benefit of all parties interested in their prices, *without making it public.*" (Ex. 363-B.) (Italics mine.)

b. That members refused to sell f. o. b. refinery, stating repeatedly that if they did so, they would violate their obligations to one another and to the Institute. The evidence establishes beyond question that the purchasing trade entertained the belief that defendants inaugurated and maintained delivered prices by concerted action under Institute auspices; a belief deliberately created by the Institute and the refiners.

Texas circular letter of May 7, 1929, to its brokers has already been quoted.

[fol. 203] The correspondence with some of the offshore sugar brokers hereinabove described, must also have tended to create this impression among the trade generally, inasmuch as they handled domestic refined as well. Naturally in negotiating with defendants' customers, they would pass along their own impressions.

It is also perfectly clear that Judge Ballou in a conference with Edgar's attorney, Eaman, in which the latter sought to enlist the Institute's aid in breaking down the delivered price system, gave Eaman the impression that the delivered price system was necessary to prevent abuses subversive of the code principles. Eaman testified that Judge Ballou "said it [purchase of sugar f. o. b. refinery] could not be done any more." (R. 700.) Defendants contend that Ballou merely meant that refiners must maintain their terms as openly announced. But from Eaman's testimony as a whole, it is apparent that what Ballou actually said naturally gave him a different impression. I cannot believe that Ballou was unaware of the impression that his words conveyed.

That the Institute did seek to prevent a breakdown of delivered prices is indicated by the cross-examination of Cummings.

"X Q. What moral or ethical principle of the refiners—perhaps I should say what moral or ethical principle, if any, of the refiners caused the efforts of the Institute to prevent a general breaking down of the delivered price system of freight rates.

"A. To prevent discrimination; industrial, geographic.

"X Q. In other words, you feel that if the delivered price system calls for rates on a particular level and if there is a general breaking down of the whole delivered price sys-

tem whereby the rates are quoted, all territories are affected on a lower level.

"A. I don't know what you mean by the delivered price system. The delivered price system was not any system of the Institute. The Institute had nothing to do with putting in your so-called delivered prices." (R. 4968.)

[fol. 204] The latter answer denies merely that the Institute did anything about "putting in" delivered prices; not that it sought to prevent their breakdown.

In their correspondence, refiners deliberately gave the impression to the trade that there was an understanding among themselves on delivered prices. Thus Henderson stated in a letter to a broker:

"We cannot do that [ship f. o. b.] and no other refiner will do it either." (Ex. 457-Z-4.)

National, in a letter to a customer of May 25, 1929, signed by its President, James W. Post, stated:

"We are in receipt of your letter * * * in regard to the rate of freight to Rochester.

"We greatly regret that we cannot comply with your request in regard to granting the canal rate, as we are only selling our sugars in the Rochester market at our F. O. B. New York price plus the rate of .294 on bags and .31 on barrels, cases and containers, regardless of how shipment is made.

"The situation has made it necessary for us to try to cooperate in uniform methods of selling." (Ex. 457-T-3.) (Italics mine.)

Again, in a letter a year later to a Detroit customer, similarly signed, National said:

"We are in receipt of your communication * * * requesting that 114 barrels of granulated sugar the balance of a lot of 250 barrels be shipped you by Barge. * * *

"We cannot comply with this request. The contract entered into by you for the purchase of this sugar provided that this company reserved the right to route the shipments, adding the freight to destination to the price. Under this contract we will ship this lot to you via all rail Detroit, adding to the price fixed in the contract the freight charge to this point.

[fol. 205] "In your letter you request that the reason for not observing your shipping directions be outlined. In reply to this we beg to state that the observance of the contract provision is rendered necessary in order to insure economy of operation at this point and the stabilization of trade conditions in Detroit." (Ex. 457-X-5.)

Responsible representatives of various refiners stated that they could not sell except on a delivered price basis, because of the Institute. Defendants insist that such statements indicate "nothing more than the refiners' observance of their own open announcements, and the occasional use of the Institute as an alibi by refiners' sales representatives". (Fact Brief, p. 235.) The form of many of these statements as will presently appear shows that they were intended to mean more than that the refiners must adhere to their open announcements.

"Dozens of times" one customer negotiated with different brokers for purchases f. o. b. refinery without success. The "reason * * * generally given * * * that due to rules of the Institute, the refiners were not willing to take business of that kind * * *" (R. 767) and that barge shipments were "impossible, due to rules put out by the Institute * * * that no refiner would accept such business, only on a delivered price, with the rail rate added." (R. 760.) Among the refiners represented by the brokers with whom this customer negotiated were National, Revere, McCahan, Colonial, Arbuckle, Pennsylvania and Spreckels. (R. 759, 767, 768.) There is also evidence that responsible representatives of American (R. 3129), Colonial (R. 6202), and Imperial (R. 1320-21) advised the trade in a similar manner when they sought to purchase f. o. b. refinery.

Defendants have introduced no evidence to show that these agents were making representations, unauthorized by or contrary to the wishes of their principals. It is clear from the testimony of the government's witnesses that they were given the impression not merely that the Institute enforced open announcements, but also that it stood back of delivered prices. In reaching this conclusion, I disregard entirely an alleged statement of Institute responsibility for delivered prices, attributed by plaintiff's witness O'Riley to a certain official of American but denied by him. [fol. 206] The fact that such statements were so generally made by the refiners, tends, in my judgment, to confirm the

other evidence of an understanding among them on the matter of delivered prices. Defendants' explanation that the statements were merely alibis cannot be accepted. The Institute did seek to prevent breakdown of delivered prices and to the extent that it did, the statements were true.

c. That pursuant to members' suggestions delivered prices were extended to other territories. While occasionally suggestions of this kind and announcement of extensions appear to have been made, nothing came of them. There is, however, evidence that defendants concertedly sought to maintain, and for a time at least, successfully, artificial freight rate set-ups in territories other than the Great Lakes and Warrior River areas, as in Central Freight Association Territory and in Texas, when there were signs of a breakdown in these areas. Some effort, too, was made to persuade Hershey and C. & H. who maintained large consigned stocks in Mobile, to refrain from quoting the lower freight rates to destinations from Mobile rather than the higher one from New Orleans. I deem it unnecessary to discuss these and other minor incidents in detail. It suffices to state that defendants did seek concertedly to some extent to maintain artificial freight rates in these matters. The fuller discussion of their activities with respect to the Great Lakes area sufficiently indicates their methods. The fact that delivered prices were in effect in C. F. A. territory and in Texas prior to the Institute does not justify concerted effort to maintain artificial rates when signs of a breakdown appear.

d. That delivered prices violated Code 3 (c) and that by the Institute's failure to enforce this provision it indicated its approval of them. The evidence shows that when delivered prices were first put into effect, Code 3 (c) was already becoming a dead letter. Moreover, the unanimity of the refiners' action in respect to delivered prices repealed Code 3 (c) de facto, at least in the territories where delivered prices applied. In them there was no reason for further effort to enforce it. While the Executive Secretary personally may have been strongly in favor of delivered prices, this fact alone is no evidence of the Institute's action with respect thereto.

However, it is somewhat significant that the principles of Code 3 (c), its avowed purpose of preventing "Discrimina-

tion", and its definite recognition of a customer's right to [fol. 207] purchase f. o. b. refinery, were completely forgotten when another system was devised to solve the problem of the Great Lakes and Warrior River areas. For delivered prices as employed by defendants accomplished virtually the very things which they professed the desire to eliminate by Code 3 (c) for the benefit of the purchasing trade. The argument made for Code 3 (c) is that absorptions are reflected in higher basis prices which in turn produce a discrimination in favor of distant customers as against those near refineries. But delivered prices, as employed by defendants, create a discrimination in favor of nearby customers by reason of arbitrarily high prices to customers at remote points. This confirms the conclusion heretofore stated that Code 3 (c) was not actually designed to eliminate discrimination and that defendants were not concerned with the customer's right to purchase f. o. b. refinery. Their real purpose was to solve, in a manner advantageous to themselves and without consideration of the trade, a troublesome transportation problem.

The discrimination, however, is much more real in the case of refusal to sell f. o. b. coupled with an arbitrarily high delivered price. The extent to which the delivered price is higher than actual cost of transportation definitely measures the discrimination. But the extent to which absorptions are reflected in higher base prices is largely speculative.

e. That the Institute's policing of alleged violations of refiners' delivered price announcements was part of the scheme to maintain delivered prices. Defendants insist that the policing activities were merely in aid of the policy of open announcement, for the purpose of discovering departures therefrom and of persuading adherence thereto. However, since the other evidence shows that delivered prices were in fact maintained by the concerted efforts of the combination, the policing activities would of course be illegal, if it be illegal concertedly to maintain delivered prices.

[fol. 208] Delivered prices were withdrawn in the Great Lakes area, May 3, 1931, a little over a month after the bill in this suit was filed; they had broken down in the Warrior River about the end of May, 1930. They eventually broke

down, too, to a large extent, in C. F. A. territory and completely in Texas, but just when this occurred is not clear.

In my judgment, it is unnecesary to speculate as to the relation of the withdrawal of delivered prices in the Great Lakes area and the pendency of this suit or as to the cause of their breakdown elsewhere. It sufficies that there is a substantial danger that unless restrained, defendants may again attempt to inaugurate delivered price set-ups. Thus, in November 1931, American again sought to put such a system into effect. All refiners followed except Arbuckle. Accordingly, the attempt failed. About this time, a customer was told by a broker representing one of the refiners that on advice of counsel, defendants would not raise the 36.1¢ Chicago rate, announced in May, 1931, to the 51¢ rate theretofore in effect, until after this case was over. But regardless of this evidence, I think it abundantly clear that there is a strong probability that defendants, unless restrained, will again seek to solve their transportation problems by the same means that were heretofore used.

[fol. 209] B. Institute "Information Service" in Transportation Matters.

Defendants describe the essential activities of the Institute with respect to this service, substantially as follows:

1. The Institute has relayed announcements of changes in freight applications since soon after its formation. A code Interpretation recommends:

"Any change in the application of freight rates should be reported to the Institute in the same manner as a price change. It will be handled in the same manner."

Nevertheless, because of the greatly increased number of freight application changes since the Institute, it gradually ceased telegraphing all of them. All announcements are relayed immediately, but only the important ones by wire; the remainder go by mail. While price announcements are always telgraphed by the refiners to the Institute, freight announcements come in also in various slower ways. The only change since the formation of the Institute in refiners' announcements of changes has been to send it copies simultaneously with or after the communication to the trade. The majority of changes are announced as effective imme-

diately; some are made retroactive to meet announcements of competitors. Changes to take effect in the future are extremely rare. A refiner receives freight announcements like price announcements from trade sources direct, as well as through Institute relays.

Freight announcements were sent only to the members of the Institute, the Domestic Sugar Bureau and certain brokers; the Institute, however, sent freight announcements and gave information of freight applications to anyone who asked for them. The announcements, because they are essentially local in character, were not sent to news agencies. Since 1930, the Institute has sent all announcements to all members regardless of the territory affected.

2. In 1929, the Institute started a "freight book" which was later supplied to each refiner. It is a loose-leaf volume, with a section for each state, except the eleven western ones. Each state contains three kinds of sheets, giving respectively [fol. 210] the selling terms then in effect, such as cash discount periods, price guaranties, special payment plans, etc.; the then freight applications with any special rates or exceptions which have been announced, in each case with the names of the refiners who have announced them; and a list of those trucking companies used by the various mem- sheets were summaries of information already sent out in bers, which have signed nonrebating agreements. The sheets were summaries of information already sent out in the relayed announcements of refiners; they contained nothing new except during a short period when sheets were used to relay some announcments. Although the original idea was to keep the book up to date at all times by the use of supplements, of which a great many were issued, the number of changes in freight applications became so great that in fact the book was often months behind.

3. The government charges in effect that the system of freight application announcements and the "freight book" were used by defendants in aid of and to make effective certain of their allegedly illegal activities. Defendants virtually concede that the system was used by the Institute in aid of its efforts to make Code 3 (c) effective. See Fact Brief p. 199. It is, likewise, entirely clear that the system was a vital link in the Institute's activities to maintain the delivered price set-ups and that the "freight book" was

used in aid of the concerted activities with respect to transportation matters generally and contract terms. An example of the latter use of the book is hereinafter * described in the discussion of the "four payment plan." Individual refiners had accurate freight books of their own. At best the Institute service could be justified, if at all, as a slight "convenience."

[fol. 211] C. Miscellaneous Transportation Matters.

1. Transiting and Diversion.

Plaintiff charges undue restraint of trade by defendants' concerted endeavors to limit buyers in transiting and diverting sugar.

Defendants assert that these privileges are granted by the carriers and are subject to rules and conditions contained in tariffs filed with the Interstate Commerce Commission. Transiting (sometimes called retransiting or storage in transit) permits storing a shipment at an intermediate "transit point" designated by the carrier and subsequently forwarding it to a point beyond. Diversion (sometimes called reconsignment) permits a change of destination or consignee while goods are in transit. In both cases the through and not the higher combination rate is applied from point of origin to ultimate destination via the storage or diversion point respectively.

Under the tariffs, the transit privilege is granted to the shipper or consignee. The transit billing, on a shipment by a refiner to a consignment point, was its property and could be transferred only by its endorsement. On a refiner's shipment ex-consignment from the transit point, it would have had to take large absorptions, but for the transit billing, since the purchaser at the point beyond was charged a freight application based on the lower through rate to such point.

Defendants contend that the use of their transit and diversion privileges by others since the Institute, has been of concern to them only where the original shipments were made by the refiners and then only in two respects: (1) in so far as they might be used to defeat the refiners' freight applications and (2) as the refiners might become involved in possible charges of violation of the Interstate Commerce

* Pp. 106-8.

Act through the misuse of these privileges; beyond this, they claim never to have taken steps to restrict or interfere in any way with the transiting or diversion of sugar.

[fol. 212] As to violation of the Interstate Commerce Act, plaintiff contends that defendants concertedly sought to limit a rule of the "transit tariff" by deliberate misinterpretation and to compel customers, especially Edgar to abide by their interpretation. This incident is now of no importance inasmuch as the new "Boyd tariff" hereinafter* considered, has clarified the matter. Defendants' interpretation of the original tariff is admittedly not unreasonable; whether or not it was made in good faith, I need not inquire. Plaintiff charges, in connection with this matter, that an Institute investigator encouraged by Institute officials sought to bribe an Edgar employee to reveal certain records of that firm; in my judgment, as to this, the burden of proof has not been sustained.

Because of the artificiality in the freight applications charged by the several refiners both before and increasingly since the Institute, there were opportunities for using transiting and diversion privileges to get sugar to ultimate destination at a cost to the purchaser below that of the announced freight application of the refiner. Thus, prior to the Institute, a blanket freight rate of 84¢ from the Pacific Coast covering the entire territory from the Rocky Mountains east to Chicago and St. Louis was in force and in the western part of this territory, too remote for eastern and southern seaboard refiners to compete, it was the actual rate charged the purchasers. But at points farther east, at which the tariff rates from the eastern and southern seaboard were less than from the Pacific Coast, the California refiners, in order to compete had to absorb part of the freight by making freight applications lower than 84¢. Sugar bought from California refiners for delivery at more easterly points on the lower freight application might then be diverted to a more westerly point; refiners' higher application for that point would, thus, be defeated. Texas offers another illustration. Prior to 1928, blanket freight rates were in effect at Texas points both from New Orleans and from the Texas refining points; the Texas refiners always charged the New Orleans rate which then was 17¢ higher and refused to sell f. o. b. refinery.

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* Pp. 79-80.

In 1928, Texas was put on a mileage and New Orleans on a zone basis. Dallas and Hearne, being in the same zone, bore the same tariff rate, 58¢ from New Orleans; but from Sugarland, Texas, Hearne was 28¢ and Dallas 38¢. The refiners freight application from either New Orleans or [fol. 213] Sugarland to Hearne was 45¢, to Dallas 55¢, in each case, the Sugarland tariff rate plus 17¢. On an order placed with the New Orleans refiner for shipment to Hearne, Texas, the refiner would prepay the actual freight at the rate of 58¢, billing the customer for the freight application of 45¢; the refiner thereby absorbed 13¢. If, before the car reached Hearne the customer diverted it, or from Hearne transited it to Dallas, there were no additional freight charges. Thus, the buyer had the sugar in Dallas at a transportation cost of 45¢ instead of the refiners' freight application of 55¢ to his Dallas competitor.

The evidence shows that both before and since the Institute, diversion and transiting have been used by customers to defeat freight applications either by misrepresenting to the refiners the actual destination and then transiting or diverting the sugar, in effect practicing a fraud upon the refiner, or with the refiners' consent, either secretly as a screen for a secret concession, or openly.

Obviously, transiting and diversion if used to defeat freight applications, would disturb the artificial rate structure. The advantage of the Hearne dealer in the example given, would naturally cause the Dallas dealer to press the refiner for a reduction in his freight application with a consequent tendency to break down the freight rate structure. Defendants contend that their object in regulating these privileges was to prevent frauds upon themselves and secret concessions by their competitors with resulting discrimination. But it is clear that concerted action was unnecessary to combat the fraudulent use of these privileges. Indeed, the recommendations of the Institute with respect thereto contemplated merely that the individual refiners would take steps individually to make sure that frauds were not practiced upon them. In the final analysis, prevention of secret concessions through these privileges depended upon the honest desire of the individual refiner to eliminate them. And the discrimination that resulted from their use, if they were used openly, was neither more nor less vicious than

the discrimination inherent in the artificiality of freight structures which the defendants either independently or in concert employed. The agreement on the part of defendants to prevent transiting and diversions was essential to the success of their concerted efforts since the Institute to maintain artificial freight rate structures.

[fol. 214] Defendants' activities are indicated by the detailed recommendations in Code Interpretation, Sec. 1, pp. D1-D4, with respect to the action that the individual refiners should take to make certain that no transiting and diversion defeated the refiners' freight applications. These recommendations based on the collective experience in the industry, may have represented the most effective means for discovering frauds; but insofar as they aim to have the refiners prevent even such transiting and diversion by customers as the refiner might be willing to consent to their only purpose was to aid in maintaining the artificial freight structure.

A further charge against defendants is their concededly concerted endeavor, in part successful, to have the railroads make certain changes in the transit tariffs. Defendants' description of the facts (paraphrased in part from their brief) conforms substantially to the record:

The different transit rules, adopted from time to time by individual carriers, while similar were not altogether uniform; there were, too, minor difficulties over their interpretation. The refiners as shippers desired to obtain better control over the transiting of their own sugars and sought the simplification which would result from one uniform, master tariff. The railroads, in conjunction with the National Industrial Traffic League (the national association of shippers) and with the advice and consent of the Commission, have set up a procedure by which shippers may propose changes in railroad tariffs. It contemplates the presentation by shippers to the railroad officials of request for changes in tariffs and for notification to shippers of changes proposed by the carriers themselves. All proposals are placed on a public docket which is printed in the "Daily Traffic World", a publication subscribed for by persons interested in tariff changes. Hearings, at which all interested parties may present their views, are held before the railroad traffic officers. There is provision for appeal to a committee of higher traffic officers, and of course, after a tariff embodying a change has been filed

and published, there is recourse to the Interstate Commerce Commission for its investigation and suspension.
[fol. 215] This procedure was followed in the present case. The idea of a master transit tariff was first advanced in the fall of 1929. In November 1929, the representatives of the refiners and beet sugar interests met to prepare a draft. This draft was then sent to various railroad representatives throughout the country with the request that it be formally docketed for discussion. The draft was revised somewhat by the carriers' representatives, who then put it out not as a shippers' request but as a railroad proposal. Public hearings were held by the railroad traffic officials in both the east and west early in 1930; the matter was then taken up at a joint public hearing held in Chicago in March, 1930. At this hearing, there were represented freight associations, individual railroads, the refiners and beet sugar interests, warehousemen, municipal traffic bureaus, chambers of commerce, associations of shippers and individual sugar buyers. A railroad representative, opened the meeting by stating:

"The purpose of revision is to make the rules more specific, prevent misinterpretation and consequent misapplication—a practice which has prevailed more or less with respect to present rules, defeating the lawful rate; to establish uniformity, thereby avoiding undue discrimination and complying with the requirements and answering the criticisms of the Commission with respect to transit abuses." (R. 6164.)

A discussion of the rules followed. The carriers then began working on a tariff ultimately filed by them with the Interstate Commerce Commission in June, 1931, to become effective in July. Petitions were filed with the Commission to suspend the tariff and the Commission did suspend one item; this suspension was later made permanent by consent. The remainder of the tariff became effective throughout the country in July 1931. This, the "Boyd Tariff", superseded the individual tariffs of the several railroads.

So far as the record shows, the defendants' actions in this matter were entirely fair and open. They were such as might normally be expected of any group of shippers desiring to obtain tariff changes. In my judgment, they provide no basis for a charge of unreasonable restraint of trade.

[fol. 216] 2. Water Carriers and Private Charters.

Admittedly, defendants sought and in the spring of 1930 obtained from transportation companies operating on the New York State Barge Canal an agreement that they would carry sugar only on the basis of openly announced rates and terms from which they would not deviate without open announcement. In code interpretations, the Institute recommended that members should refrain from employing water carriers that did not publicly announce rates and terms or in any way deviated therefrom. (Sec. XII, par. 1(a) and 1(b).

The Government refers to one incident of alleged boycott, but any withholding of business from the carrier in question was only temporary; defendants insist that there is no evidence that they actually refrained from dealing with any water carrier. The important fact, however, is that the threat of such action resulted in the open announcements which the institute sought. Defendants justify their action as reasonably designed to prevent secret rebates by the carriers. There is little evidence that the carriers indulged in the practice of secret rebating and the defendants themselves rely upon "rumors" rather than actual knowledge that such practices were engaged in. In my judgment, an important purpose of the defendants in seeking these agreements was to effect a stabilization of transportation rates.

Code Interpretations, Sec. I, p. C2, contain certain recommendations with respect to shipment by private charters:

[fol. 217] "(b) Refiner's Account:

"No member of the Institute should ship sugar on his own account by private charter except when such charter is arranged directly between refiner and carrier, and refiner is satisfied no broker, buyer, nor warehouseman is participating in the rate.

"(c) Terms of Charter:

"Members are requested, before shipment (and regardless of whether the sugar is sold on delivered prices) to submit the terms of every such private charter to the Executive Secretary, so that he may scrutinize it for any indications of rebate or other violation of the Code of Ethics."

Defendants assert that "rumors" of rebating led to the adoption of these recommendations and that the purpose thereof was to prevent rebates. But here, too, the recommendations went further than was necessary to accomplish the ends; in my judgment, the real aim was to assist in the preservation of the price structure.

3. Pool Cars and Pool Cargoes.

As minimum cargo was often as high as 2000 bags and minimum carload usually 600 bags, customers, unable to purchase in such large quantities, could by clubbing together, obtain cargo or carload rates. Defendants, acting under Institute recommendations, concertedly refused to aid customers in making up the required minima by themselves participating in such pools with sugar shipped on their own account. In justification they urge the discrimination that would result from participations inasmuch as, due to refining schedules and sales requirements, they could not grant this privilege to all customers. But there is nothing unfair in an apparent discrimination which results solely from the necessary limitations of a refiner's capacity in this respect.

4. Mixed Cars of Sugar and Syrup.

Plaintiff contends that defendants sought concertedly to restrict the making up of mixed car lot shipments by including syrup. Refiners to whom this arrangement was not [fol. 218] available used consignment service, and thereby affected defendants' program for reduction of consignment points. While defendants were troubled by this situation and discussed it on several occasions, no effective agreement or understanding with respect thereto appears to have been reached.

"It was the concensus of opinion" at one meeting that effort should be made to induce syrup producers to refuse to include their syrup in mixed cars, Ex. 459-O. Evidently nothing came of this for there is evidence that mixed car shipments continued and continue to be made as before. There is also evidence that the Sales Manager of Imperial sought successfully to have carriers limit the transit privilege on mixed cars. In my judgment, there is no basis for a charge of illegality in such action. In the absence of evi-

dence to the contrary, I accept defendants' explanation that the carriers in so acting were merely interpreting their transit tariff.

5. Trucking.

In respect to trucking, which as a means of transportation has become increasingly important in the sugar industry in the past few years, defendants' policy was similar to that regarding brokerage and warehousing; they agreed to use only trucking concerns not affiliated with any buyer, broker or warehouse and then only under nonrebating contracts. This, they insist, affected the warehouse trucking for refiners but not for its own customers. But in any event, the alleged justifications, similar to those offered as to brokers and warehouses are equally without merit.

6. Switching.

Plaintiff charges that defendants have restrained the absorption of switching charges by members. For a substantial period of time it was recommended in a Code Interpretation that members should "adopt in all territories the practice of not absorbing switching charges on deliveries from consigned stocks to buyer's warehouse or spur" with certain exceptions. (Sec. VII, p. 2, par. 4.) This provision remained in effect until May, 1931, after the bill in this suit was filed. In justification thereof and of the actions of the members pursuant thereto, defendants urge that ab- [fol. 219] sorption of switching charges increased the expense of consignment service and therefore intensified the inherent discrimination in such service as against those customers who could not enjoy it. However, as hereinbefore pointed out, defendants could and did recoup themselves at some points for the expense of consignment by charging for transportation ex-consignment at a higher rate than they in fact paid in moving their sugars.

7. Additional charges, denied by defendants, are of concerted action (a) respecting freight applications on l. c. l. deliveries at some points; (b) restraining delivery service at some points from docks to the buyer's place of business. I pass them inasmuch as the evidence in support of plaintiff's contentions concerns only a few incidents of minor importance.

VIII. Consignment Points

1. Prior to 1925, refiners maintained on their own account stocks of sugar at a relatively few strategic points throughout the country, known as consignment points; from them, sugar was distributed locally and to the surrounding area.

During the period 1925-1927, consignment points increased; refiners put in stocks at numerous points solely for the local trade. But to hold their trade and to share in the advantage accruing to the first consignor, competitors followed his example; a substantial increase in consignment points resulted, as is indicated by the testimony that C. & H. increased from about a dozen in 1925 to about 100 in 1927. (R. 6775, 6777-78.)

Defendants regarded this increase as one of the "outstanding evils" of the industry. Fact Brief p. 155. Explaining the remedy adopted, they say:

"The defendants freely conceded throughout the trial and still concede that this was a matter in which they acted concertedly, in the sense that all recommendations of this Institute as to consignment points were made only by unanimous consent of the members.

* * * * * * *

[fol. 220] "The defendants contend that it was an entirely proper and legitimate function of the Institute to recommend, and for the members concertedly to proceed with, the reduction in consignment points" because "the tremendous expenditure required for the maintenance of consignment points, which the entire consuming public ultimately had to pay, resulted in no real advantage to anyone and therefore represented sheer waste." (Fact Brief, p. 154.)

They concede, too, that the Institute sought and obtained the cooperation of the Domestic Sugar Bureau and other non-members and assert that no reduction could otherwise have been effected. (Fact Brief, p. 170-1.)

The Institute attempted to bring about reductions in three important areas:

1. The Northeastern & Central States.
2. The South.
3. States in Northwestern Mississippi Valley territory.

Defendants assert that refiners were under no compulsion to follow an Institute recommendation for reductions, that after approval they were later disregarded. On the whole, they say, the Institute program was unsuccessful as consignment points increased from 344 to 468 and total consigned stocks from 670 to 1796, between 1927 and 1931 (Ex. S-6), while deliveries from consignment increased from 26.28% of all deliveries in 1928 to 32.53% in 1931 (Ex. W-6). These facts, however, are immaterial. Controlling is the concession of an agreement to eliminate consignments at many important points and of the success of the Institute program in many important areas. Thus, between 1927 and 1931, they decreased in the New England states from 5 to none; New York, five to three; Pennsylvania, nine to two; Ohio, sixteen to three; Indiana, seventeen to four. In the southern states east of the Mississippi, reductions were even more marked. (See Exs. Q-6, R-6, S-6.) All reductions were admittedly effected by Institute activities. The increase in total consignment points 1927-1931, was in part due to the increase in Illinois, Missouri and Arkansas, as to which refiners were unable to agree on [fol. 221] a program. In these states alone, there was an increase of 121 during this period. In some other states, the increase evidently was due to the failure to effect an agreement with beet manufacturers.

Plaintiff charges also that defendants agreed upon the elimination of (1) reconsignment points "where sugar is stored only for forwarding in carload lots", (2) reconsignment warehouses and (3) ports of entry where according to the Government contention, "members may sell at the same price as at refinery points". (Government Brief, p. 423.)

While reconsignment points were separately dealt with by the Institute only in the South where all of the usual ones were retained, obviously a recommendation of these specific points was a restriction to the points named and as such tended to prevent an increase. Therefore, defendants' assertion that "the recommendation had no practical importance" (Fact Brief, p. 159) cannot be accepted. There is however, apart from the Institute's general program with respect to warehouses, no other evidence of a restriction of reconsignment warehouses.

Defendants assert that plaintiff's description of ports of entry as "Points where members may sell at the same price

as at refinery points" is entirely erroneous, that in fact some of the cities described as ports of entry had freight applications until recently. They maintain, too, that though in recommending consignment points in the South, ports of entry like reconsignment points were separately classified, this was without significance. It is quite clear, however, that ports of entry did present a special problem; Wilmington, N. C., port of entry used by Hershey, was admittedly (Fact Brief, p. 161) eliminated as a storage point through Institute activities, notwithstanding that as Judge Ballou stated, "it is difficult to say how they [Hershey] can do business at all at or through Wilmington unless they break bulk at Wilmington, which involves a maintenance of stock at that point." (Ex. 331, p. 2.) Defendants insist that the Institute was not interested in ports of entry as such but only insofar as they were used as storage points. Regardless of defendants' motives, it is clear that limitation of ports of entry would be more serious than elimination of ordinary consignment points; at least insofar as it shuts a competitor out of a particular [fol. 222] territory, it could not be justified.

Concerted action to reduce consignment points was proper, defendants urge, because (1) the ex-consignment business of the small refiner, unable to finance as many stocks as his large competitor, was necessarily restricted and he therefore was not adversely affected; (2) consumers in communities where consignments were not maintained were damaged because the expense of this allegedly free service elsewhere was necessarily reflected in a higher basis price for sugar generally, and (3) numerous consignment points involved economic waste.

(1) While the situation of the small refiner is obviously as stated, the conclusion therefrom is not so certain. There are certain disadvantages to him if compelled to limit consignments. Thus, the New York Sales Manager for Colonial, in commenting to his home office on the likely effects of consignment reductions, wrote:

"* * * at times when the trade are on a hand to mouth basis and if forced to order in carload lots, it is quite probable that the order will go to the refiner who can supply softs, powdered and fancy grades. If, however, they withdraw from cinsignment stocks, we would probably share in the business by specifying for some of the grades we

make and a portion from refiners who make soft sugars." (Ex. 447-A.)

(2) While the cost of increased consignment points might well be reflected in a higher general basis price, there is no assurance that the savings effected through some reductions thereof would be passed on to consumers generally. The result in either case is largely speculative. The savings might in the long run be kept by refiners or used, perhaps as in this case, to install new consignment points elsewhere. Moreover, as already pointed out in the discussion on transportation, defendants did not always give consignment service free. By shipping sugar to consignment over a differential route and charging for transportation on ex-consignment sales, as if shipped over a higher rate route, defendants could and did recoup themselves at times for the service.

[fol. 223] (3) Defendants declare:

"Consigned stocks are * * * of no real value to the customers, and are used when available only because of the human tendency to rely upon them and to fail to order in advance * * * this small element of possible convenience * * * can alone be advanced as a possible justification for the expenditure of millions of dollars annually." [19a] (Fact Brief, p. 167-168.)

Defendants conclude "that consignment expense represents a sheer waste." (Fact Brief, 167-168.) Plaintiff's witnesses testified to these material disadvantages suffered by customers from elimination of consigned stocks: as demand could not be accurately forecast, customers might be left with a shortage of one assortment and surplus of another; inadequate stock facilities restricted market areas; financing larger stocks was difficult for customers; there was a loss of the convenience of getting deliveries in less than carload lots. A defense witness, too, testified to the convenience of the consignment service (R. 8312); and the competitive advantage to the refiner who gave the service was concededly so substantial that other refiners "usually had to follow and establish their own consignment stocks." (Fact Brief, p. 155.)

In their endeavor to show that consignment service is a waste, defendants estimate its cost to themselves as 10¢

per bag and then seek to show that if refiners eliminate consignments, this expense is not shifted to the customer because the latter has vastly smaller storage and insurance charges and a rapid turnover which eliminates carrying charges. (Fact Brief, p. 165, 6.) This may have been true [fol. 224] of some customers, but for others, the cost of warehousing, the largest element in the refiners' cost of consignment service, is shown to have been as large as that of the refiners. It may be doubted, too, whether refiners could not have reduced cost of consignment by more efficient management; thus defendants' own evidence indicates that excessive consigned stocks were piled up prior to the Institute through their lack of knowledge of the real market conditions. This was one of the reasons given for the need of statistics. It may well be that if refiners had addressed themselves to the proper use of the statistics provided by the Institute rather than to the elimination of consignment service, they might have effected more substantial economies. Defendants refer to evidence that customers effect savings in trucking charges and obtain fresher stocks by using direct as against ex-consignment delivery. While this is true as to customers in a position to use these advantages, it demonstrates not that consignment service is sheer waste but only that there are some disadvantages attached to it. That customers unable to buy in carload lots could buy l. c. l. quantities through pool cars or that refiners gave customers adequately prompt service without local consignment, aids their argument only insofar as it tends to show that consignment service, however convenient and valuable, was not absolutely essential.

Two results in this matter indicate further evils of defendants' program.

First. The community eliminated as a consignment point might suffer as against a neighboring one because of the advantage thereby accruing to the latter point. Fort Wayne, Indiana, but not Indianapolis, was eliminated, Fort

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[19a] Defendants estimate the cost of consignment service during the Institute period as varying from $2,500,000 to $2,900,000 annually. This estimate does not take into account the extent to which defendants recouped themselves at particular points by charging a higher freight application than their actual cost of transportation.

Wayne's Chamber of Commerce complained that this gave Indianapolis an advantage. In reporting to the president and vice-president of the C. & H. counsel for that Company said:

"The Fort Wayne Chamber of Commerce may have a good case. If jobbers situated in Fort Wayne and Indianapolis are competing against each other for business in outside territory common to both cities, it stands to reason that the Indianapolis jobber has all the advantages and can do business with less overhead and more profit to himself." (Ex. 407-N, p. 2.)

[fol. 225] A similar situation is shown as between other cities.

Second. The elimination of consignment points also had the effect of eliminating from the distributing agencies, one type of jobber, the "desk jobber." These distributors were enabled to do business without any stock of their own solely because of the refiners' consigned stocks.

Defendants have shown no valid reasons for eliminating cities like Fort Wayne, as against Indianapolis, or for eliminating desk jobbers. In view of the obvious hardship and unfairness resulting therefrom, defendants' policy could be justified only on the strongest considerations. As already indicated, these have not been shown.

2. In Aug. and again in Sept. 1928, the Institute recommended a service charge on l. c. l. deliveries exconsignment. Soon thereafter a 5¢ charge was put into effect by all members; there is evidence that this amount was agreed upon. The charge was discontinued early in 1929. Agitation by some members for a renewal thereof in the fall of 1930, was unsuccessful.

Defendants contend that this concerted action was entirely proper because of the cost to them of consignment service. But, as heretofore shown, refiners could and did recoup the consignment expense at some points by charging for transportation on ex-consignment service at a rate higher than the cost. The charge moreover was discriminatory because there is admittedly as much reason for a service charge on carlot as on l. c. l. ex-consignment deliveries. Defendants' action, in my judgment, was entirely without justification.

[fol. 226] IX. Activities Relating to Miscellaneous Contract Terms and Conditions.

A. Long Term Contracts.

Plaintiff charges and defendants deny that they agreed to make and, with certain exceptions, made no sales or contracts calling for sugar deliveries over a period longer than 30 days; further, that the agreement was enforced through the Institute. Defendants assert that with rare exceptions, the 30 day contract was the well nigh universal custom before the Institute, and that longer period contracts necessarily resulted and would result in discriminations.

The evidence establishes that before the World War, 30 day contracts were customary for all except manufacturers who were granted 60 days. While there was no definite practice since the war, long term contracts were certainly not infrequent. During the immediate pre-Institute period, at least two refiners gave them; the California refiners—to the Pacific Coast canners and Revere—"to any of our customers who were in a position to use it." (R. 5547.) Moreover, contracts calling on their face for delivery over a period in excess of 30 days, were entered into during the immediate pre-Institute period, by American, National, Federal, McCahan, Godchaux, Imperial, Savannah, Pennsylvania, and Henderson with merchandisers of sugar, chain stores, and manufacturers. This last class had readily obtained them at all times prior to the Institute. The terms and conditions of the various contracts differed. Some called for deliveries in stipulated amounts at definite periods, others, for a stipulated amount to be delivered at the buyer's call; Revere's provided for a 10¢ concession off its basis price at the time of delivery, others specified a fixed price for all the sugar called for by the contract. Furthermore, the practice was wide spread to contract for thirty days delivery although both parties then knew that the refiner would, as he did, extend the time to 40, 50 or 60 days.

Defendants insist that the long term contracts other than Revere's and the Californians' were secretly arranged with favored buyers and carried discriminatory concessions. But even the ethical refiners appear to have given their long term contracts on the basis of private negotiations. Thus Revere "offered it to a good many of our • • • customers that we thought it was advantageous to both of

[fol. 227] us to have"; but these contracts were not announced to the trade generally. (R. 5547-8.) Henderson, another ethical refiner, also gave long term contracts to some of its trade, apparently without general open announcement. As a practical matter, it was probably necessary that such contracts should be made on the basis of private negotiations, because their terms were necessarily somewhat complicated and would depend upon the needs and situation of the particular customer.

The economic value of such contracts in this industry is apparent. As is hereinafter pointed out in connection with quantity discounts, contracts like Revere's requiring that a stipulated amount of sugar be delivered at definite intervals over a long period, would tend to bring about greater evenness of production through the year and this, as defendants virtually concede, would effect economics for the refiner. But perhaps of more importance is the value of long term contracts to the purchasers, specifically to manufacturers who use sugar in the making of another product. Especially if they announce their sales price long in advance of manufacturing, it is vital for them to know as early as possible the costs of the various elements entering into their finished product. The evidence shows that the astute refiner could protect himself against fluctuations in the raw market by hedging through sugar futures far more readily than the customer, because more familiar with and accustomed to such operations; Lowry * testified that one who knew his business could offer a long term contract even with a guarantee against price decline and not lose money.

[fol. 228] Defendants' assertion that subsequent to the Institute, long term contracts were not barred by any agreement, is so inconsistent with the evidence, that I deem it unnecessary to discuss in detail the testimony of the

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* Lowry, whose testimony is frequently referred to, was at the time he testified, President of the National Biscuit Company. Prior to that, he had been president of Lowry & Co., brokers representing offshore and other sugar interests. Just prior to the Institute, he was interested in the operation of the Pennsylvania Sugar Co. under a lease arrangement. Before that, he was connected with a firm representing raw sugar producers; until 1920, he was general sales manager for Federal.

several witnesses and the exhibits which have been introduced on this subject; indeed the contrary was virtually conceded in argument, at least as to the first year of the Institute, when counsel stated "I submit there is nothing in this record that furnishes any real foundation for the claim that there has been an agreement among these refiners, *at least since the end of 1928*, not to offer longer than thirty day contracts." (Tr. of Arg., p. 730.) (Italics mine.) I can find, too, no substantial change in the situation subsequent to 1928.

At the organization meetings in December, 1927, the refiners agreed not to enter contracts calling for deliveries in excess of thirty days while the formal arrangements for setting up the Institute machinery were being completed. Thereafter, at a directors meeting held in February, 1928, [fol. 229] "It was finally and unanimously agreed to recommend that the present trade custom of contracts not to exceed thirty days withdrawal should be continued without exceptions". (Ex. 21-26, p. 17; recommendation printed in Code Interpretations, Sec. XI, p. I, issue of 2/17/28.) Not only did the defendants agree among themselves with respect to this matter, but efforts were made by the Institute to induce Hershey to abide by this ruling. Because California refiners objected to a change in their custom of granting long term contracts to the canners, an exception was made in that respect for the three Pacific Coast States, and Hershey was notified that it "might have the same opportunity as members of the Institute to meet this competition" in those states "only". (Ex. 428-D.)

During the first year of the Institute, because of strong protests by manufacturers against the abolition of long term contracts, a committee appointed by the Institute to devise a special contract, recommended, and at their meeting in November 1, 1928, the directors approved a contract calling for deliveries up to sixty days after the usual contract period, sugar thus sold to be packed in a distinctive container (the committee suggested a 175 lb. cotton bag, suitable to the manufacturer's needs but unattractive to merchandisers); furthermore the contract was to provide for a service charge, no guarantee was to be given, the "usual differentials were to be charged and the buyer was to declare at the inception of the contract, the delivery

dates with the amounts to be withdrawn at each date. (Ex. 21-26, p. 144.)

Defendants assert that when this recommendation was made, the Code Interpretation against long term contracts became ineffective. A subsequent printing of Code Interpretations does omit this ruling, but the evidence does not make clear just when it was dropped. More important however, the committee's recommendations adopted by the Board of Directors in November appear not to have been made effective. The minutes for the directors meeting held in January 1929, state: "The proposed special contract for manufacturers was discussed. Several members expressed the opinion that in the form proposed, that is, with a carrying charge to cover the added cost of deferred delivery, such a contract would not be acceptable to the trade. In view of this opinion no further action was taken." (Ex. 21-26, p. 190.)

No sugar appears ever to have been sold under such a contract; customers' endeavors since the Institute to obtain longer than 30 day contracts from defendants appear never to have been successful. The practice which the [fol. 230] Institute originally fostered continued despite the change in the Code.

There is, too, other evidence of an agreement subsequent to November 1928, not to offer long term contracts. In answer to a circular letter of April, 1930, from the Institute's office manager (Ex. 418-E), counsel for C. & H., who frequently displayed a very careful attitude, cautioned Institute officials against writing letters indicating that there was an agreement against long term contracts when, as he he said "So far as I know, sugar refiners have not agreed" in the matter and "such an agreement might be illegal". (Ex. W-8.) Taylor in reply stated that "the language used in this circular was unfortunate." But it is significant that so far as appears no supplementary circular was issued to members to correct the impression which the "unfortunate" language must have caused. In October, 1930, Henderson was complaining that Hershey was selling on ninety day contracts, although the Institute claimed it was doing what it could "to hold them [Hershey] somewhat in line" (Ex. 420-H-3); in May, 1931, Moog, Vice-President of Godchaux, in writing to one of their brokers said: "One of the limitations of the Institute is a 30 day contract so we are unable to dicker with the W. & W. Pickle

Co. on basis of an absolute price for shipments deferred until July, August and Sept." (Ex. 419-F-4.)

While representatives of various refiners testified that they had felt perfectly free during the period of the Institute to offer long term contracts, subject only to the requirement that it be done openly, I cannot but believe that any such freedom was purely illusory. Though subsequent to 1928, there may have been no formal agreement against long term contracts, the evidence, in my judgment, clearly establishes that throughout the entire history of the Institute, the refiners actually had an understanding that they would not grant them.

While denying that they had the agreement, at least subsequent to 1928, defendants point out the alleged evils involved in making long term contracts. But even if, as they contend, the "unethical" refiners, by granting them to some and arbitrarily refusing them to others under like conditions prior to the Institute, had unfairly or illegally discriminated as between customers, that is no valid reason for their complete post-Institute elimination. Even those unethical refiners might in the later period have granted them fairly, as did Revere in the earlier days. Whether or not a refiner, by long term contracts could more readily conceal special arbitrary concessions, is at best speculative; [fol. 231] the Institute had ample facilities to prevent secret discriminations.

Defendants urge, too, that had such contracts been limited to manufacturers, it would have been difficult, if not impossible, to prevent them from selling the sugar instead of using it for their own products, thereby effectuating an unfair discrimination as against other distributors. While this would be possible, there is no substantial evidence that manufacturers had sold or were likely to sell their sugar. Moreover, a long term contract could be offered generally by individual refiners as Revere had offered them or one type of such contract might be given to distributor customers and another granted to manufacturers, the latter in such form that it would have been impracticable for the manufacturers to sell the sugar.

In my judgment, concerted action, whether in prohibiting all long term contracts or only in insisting on open announcement of any such contract that may be offered,

is without justification. An obligation to adhere to such open announcement would tend to prevent many entirely fair contracts. While the abolition of long term contracts was effected largely through defendants' definite agreement, the requirement that prices and terms must be openly announced in advance of sales, aided in the elimination. The vice-president of Revere testified that that company's refusal, subsequent to the Institute, to enter into long term contracts, was based upon the consideration "that that was not selling on our openly announced prices and terms" R. 5548. Many long period contracts, because of their complicated terms, would necessarily have to be arranged by private negotiations. The Godchaux-Edgar contract, for example, hereinafter considered, was for an unusually long term; in it, Edgar assumed an obligation to lend financial aid to the refiner. Perhaps no sugar customer other than Edgar could have used a precisely similar contract. That fact, however, does not make the contract necessarily unfairly discriminatory. Edgar's position was unique. The requirement of announcement of all contract terms in advance of sales would make many long time contracts practically impossible; the purpose of insistence thereon must be deemed to be the prevention of such contracts.

Clearly, here as elsewhere, defendants were concerned not with unfair discrimination btween customers but with precluding the mere possibility of secret concessions and more important, with the preservation of the price structure. Clearly, too, by their agreement not to offer such contracts, they have entirely disregarded the interests of their customers.

2. Long term contracts obtained by Edgar in December, 1927, were the subject of special Institute action. Shortly [fol. 232] before or during the December 1927 Institute organization meetings, long term contracts were negotiated between Edgar and Godchaux and beween Edgar and Revere, hurried by Edgar's belief, probably shared by these refiners, that the terms would be prohibited if and when the Institute should be organized.

Godchaux, renewing with some changes an earlier long term contract, contracted to supply Edgar with 10,000-15,000 bags of sugar weekly for two years commencing in December 1927, at 20¢ under the market price of American and National. Although Godchaux long term contracts

were not openly offered to the trade, they were also given to others besides Edgar. (See e. g. Ex. 62.)

The Revere-Edgar contract called for 1,000-5,000 bags weekly for one year commencing December 10, 1927, with a ten cent concession from list price, a "type of contract that was offered to any of our [Revere's] customers who were in a position to use it." (R. 5546-47.)

Admittedly, the Institute sought and obtained from Edgar an assurance that he would maintain "refiners prices" and not take advantage of the opportunity afforded by these contracts to cut prices. (Fact Brief, p. 364; Tr. of Arg., pp. 383-385, 425, 427.) At least during most of the period of these contracts, Edgar did maintain Institute prices.

By the terms of his agreement with the Institute, Edgar was deprived of the competitive advantage of cutting prices and the consuming trade was kept from participating in the benefits of lower prices. Effectively to tie the hands of one of the refiners' most active competitors plainly constituted an unreasonable restraint of trade. Defendants assert that these contracts threatened to wreck the whole Institute project and that their "existence * * * undermined the very cornerstone on which the Institute was built." (Fact Brief, p. 363.) The contracts threatened the Institute only in so far as the Institute was concerned with uniformity of price structure.

3. It was at times impracticable to enforce to the letter the usual 30 day contract. Extensions were often granted. The Enforcement Committee during the year in which it made recommendations as to the extensions which should be granted was guided in part at least by the periodic satistics of the customers' position on their contracts (see Ex. 27).

[fol. 233] These statistics were withheld from the trade. On one occasion the Committee recommended that members should "advise the trade" that specifications on outstanding contracts must be furnished by a certain date, while at the same time it was "the opinion of those present" at the committee meetings, "that the seven days' latitude for effecting delivery of these contracts should be granted at the option of the refiner, but that the trade should not be advised regarding this extra time." (Ex. 27, p. 124. See, too, id. pp. 108, 110, 127.)

Thus defendants in concertedly enforcing contracts violated the Institute's most important principle, that of open announcement. In my judgment, too, there is no justification for concerted action in determining whether and to what extent to relax a contract term of this character.

B. Quantity Discounts

At one of the pre-Institute organization meetings in December, 1927, representatives of the refiners present adopted a resolution:

"That it is in the interests of the public and the trade generally that no discounts shall be allowed on account of quantity purchases * * *". (Ex. V-2, Meeting 12/15/27, p. 7.)

Thereafter and before formal organization was completed, representatives of the refiners conferred with Department of Justice officials; the proposed quantity discount provisions was discussed and then and there redrafted to include the reason therefor, that, "no economies were to be derived by the industry by reason of" quantity sales. (R. 4825.) (See Code 2.) Defendants insist that the scope of the rule is to prohibit discounts based solely upon quantity and this, because it would involve an arbitrary discrimination for the reason stated; only to this extent, do they seek to sustain it. Indeed, a distinguished economist who testified for and those who submitted a brief on behalf of defendants emphatically said that if economies are attributable to quantity sales, a discount is entirely legitimate. To this, defendants assent, although in their law brief the suggestion is made that at least in [fol. 234] the case of sales to chain stores, the quantity discount may be economically unwise even if economies are thereby affected.

Prior to the Institute, there was no systematic practice of giving quantity discounts. More frequently than not, it was the large buyer, the powerful bargainer, who obtained them. But they were often granted to the smaller buyer as well. Moreover, the amount of the discount bore little relation to the amount of the purchases. This was but natural in view of the pre-Institute secrecy in concessions given by the "unethical refiners". The "ethical refiners", except in the case of the Revere long term con-

tract, apparently gave nothing which might be deemed a quantity discount.

The Code and the practice under it, went further than merely to prohibit unsystematic and secret quantity discounts; even a discount systematically graded according to quantity, was prohibited. To sustain their contention that quantity discounts would effect no economies, defendants present in some detail their version of the costs of producing and distributing sugar.

Were the facts as defendants represent them to be, both as to the scope of the rule and the conditions in the sugar industry, there would then arise the legal question whether or not, under the Sherman Law, a concerted restraint is reasonable in such circumstances. But in my judgment it is clear on this record that the actual facts are entirely inconsistent with defendants' position.

Defendants analyze separately direct and indirect cost. With respect to direct cost, the argument is (1) that the refiners get no discount for quantity purchases of raws which constitute about 80% of the cost of refined; (2) that quantity sales effect no appreciable direct savings in manufacturing costs, or (3) in bookkeeping, deliveries, storage, etc. or (4) in brokerage. With respect to indirect cost, it is argued that quantity sales, (1) because of the custom of the trade in buying and in taking delivery of sugar, do not effect "greater evenness of production" and (2) because of the inelasticity of the demand for sugar, effect no economies through increased volume in production.

[fol. 235] As to cost of raws, brokerage and direct manufacturing costs, plaintiff has referred to and I find nothing that refutes defendants' contention.

As to savings on cost of bookkeeping, deliveries, storage, etc., the testimony of defendants' witnesses that large sales effected no appreciable savings with respect to these items, conflicted with Lowry's testimony, the more credible on this point. Some large sales at least would effect very substantial savings in these incidental costs; in sales to those manufacturers and distributors that can take deliveries of their sugar in carload lots direct from the refinery instead of ex-consignment, as many prefer, there are substantial savings in delivery, storage, bookkeeping and other incidental expenses. While it may be true as defendants contend, that such savings would result not from the quantity sold but from the method of taking delivery the evi-

dence shows that the large purchaser, other than the chain store, was more likely to take deliveries in this way. It does appear that no savings would be effected in large purchases by chain stores; this is because a large sale in such cases amounts in effect, in view of the method of taking delivery, to nothing more than a series of small sales to the individual stores in the chain. An agreement not to allow discounts on such sales would present a different question of legality, on which it is unnecessary to express an opinion.

As to greater evenness of production, defendants correctly say that the volume of sales in large quantities substantially follows the same peaks and valleys throughout the year as does that in smaller quantities. But the long term contracts prior to the Institute not infrequently carried the stipulation that the amount called for in the agreement should be delivered in specified weekly or monthly amounts over a considerable period of time. This was true of the Revere long term as well as the Godchaux-Edgar contracts. There is evidence, too, that Godchaux had such contracts with Coca-Cola as well as with another distributor in 1927. Of course, the prohibition against long term contracts precluded such arrangements subsequent to the Institute. The extent to which such contracts might effect greater evenness in production may be indicated by those 1927 Godchaux contracts which are in the record. Godchaux's capacity was about 120,000 bags per week. (Ex. W-7.) The Edgar contract called for 10,000 [fol. 236] bags weekly for 52 weeks, Coca-Cola, 10,000 bags monthly for three months; the distributor, 3,600-6,000 bags monthly in approximately equal shipments under a "continuing contract". (Exs. 62, 123, 141.)

Defendants assert that sugar demand is inelastic and that a single purchaser of 100,000 bags a year contributes no more to the volume of production than would 100 buyers of 1,000 bags each. Therefore, they contend, encouragement of large sales through quantity discounts whether by the individual refiner or by the industry as a whole, would not in the long run build up total production. This theory was developed at considerable length by an economist witness and in the Economics Brief. In my judgment, it is unnecessary to consider the merits of the economic argument because defendants have not sustained their claim that demand is inelastic; elasticity has been clearly proven.

Between the years 1916 and 1926, annual per capita consumption, according to the figures published by Willet & Gray, increased from 79.34 lbs. to 109.30 lbs. and for 109 years up to and including 1921, the average yearly increase in total consumption was 4.964%. During the period 1927 to 1931, the total consumption of sugar increased but slightly; but because of the inclusion therein of the depression years 1930 and 1931, the figures for this period offer no reliable basis for a fair forecast, especially in view of the substantial increase in per capita consumption during the previous decade.

Whatever be the situation as to wholesalers generally, the record affirmatively shows that a quantity discount at least to those selling to manufacturers as well as to manufacturers buying directly from the refiner, might well result in a substantial increase in sugar consumption. Defendants, perhaps unwittingly, have all but pointed this out. They assert that in the case of a proprietary or trade name article with a market capable of almost indefinite expansion, it is entirely legitimate to offer a quantity [fol. 237] discount if, to do so, will result in the expansion of demand. But they say, this is impossible in the case of a standardized commodity such as sugar. According to the testimony of one of their principal witnesses, one-third of all the sugar sold by defendants is bought for use in the making of other products. (R. 4601.) As these may well have "a market capable of indefinite expansion", a quantity discount to a manufacturer of such a product would enable him in turn to dispose of more of his product; increased demand for sugar would necessarily follow. Coca-Cola offers an example; from 1926 to 1929, its sugar purchases increased from 1,240,000 bags to 2,250,000 bags (R. 1542), an increase equivalent to nearly 1% of all sugar consumed in the U. S. during 1929.[19b] That defendants did not regard the demand as inelastic is shown by the fact that in four years they spent through the Institute about a million and three quarter dollars for advertising. R. 5232. Nor were they neglectful of these possibilities

[19b] Subsequent to the Institute, when Coca-Cola was refused special terms by the defendant refiners, it purchased principally from Hershey which never conformed entirely to Institute practices, and from a small Louisiana non-member refiner. (R 1543-4.)

for increasing consumption; an Institute official testified that it advertised not sugar but such products as "*ice cream, cereals and various other things with which sugar would be consumed.*" (R. 5098.) (Italics mine.) It is clear that, at least in many cases, a discount based solely on quantity would have been justified even under defendants' economic theory.

[fol. 238] Defendants have asserted * that the Code provision did not condemn discounts, if a refiner chose to offer them for even deliveries of a fixed quantity of sugar at regular intervals or for any other type of deliveries which might involve a real saving to the refiner. Although the language of the Code might be so interpreted, in practice the Code prevented discounts, regardless of the special circumstances of any particular transaction or class of transactions. The understanding among the refiners not to offer long term contracts precluded, as a practical matter, contracts providing for even deliveries. The only types of contract, so far as the record shows, that ever carried such provisions, were those like the long term Revere and Godchaux contracts. The Institute effectively ended this type.

Sugar buyers tried to obtain discounts for purchases which would clearly have resulted in savings to refiners. Thus, a C. & H. customer, who sought a discount for taking direct rather than ex-consignment delivery, the latter being considerably more expensive to the refiner, was told, "You know I cannot do that. That is against the code of ethics." R. 2399. This and similar efforts were unsuccessful, in my judgment, because of the understanding among the refiners that no special discounts of any kind should be allowed regardless of the economic justification therefor.

The crux of the matter is that the refiners preferred to have all sugar sold in any given trade area at precisely the same prices and terms rather than to effect economies in its sale and distribution. They prohibited deviation from the uniform sales arrangements in order to (1) preserve the uniformity of price structure, (2) prevent unscrupulous refiners from cloaking secret, arbitrary concessions in the form of a special practice. Such purposes furnish no legal justification in the circumstances of this case, for action

* Fact Brief, p. 103.

which, judged even by defendants' own theories, produces uneconomic results.

[fol. 239] C. Tolling

Plaintiff charges that tolling has been abolished by the Institute. Under the tolling arrangement, the refiner accepted raw sugar from its owner and gave him refined; not his own sugar but an equivalent quantity, usually 93 pounds for each 100 pounds of raw, the 7 pounds difference representing the loss in refining. A charge was made for the refining service.

Pre-Institute tolling agreements were made by the refiners with one another, with producers of raws, with manufacturers of products containing sugar, and with sugar merchants; they were not common, however, and were always a matter of special arrangement. National's representative testified that he had never heard of an open tolling announcement and that while his refinery did a limited tolling business, it accepted only a few such contracts because they affected its ability to serve its regular customers. (R. 8979-80.) The refiner's benefit from tolling was in not having to finance the raw sugar.

Some agreement on the subject was effected during the preliminary organization meetings in December, 1927, but whether to toll for no sugar customer or to except from the ban manufacturers of products containing sugar, is not clear. (See Exs. 434-E, 434-I.)

In July, 1928, Savannah entered a tolling agreement with Coca-Cola and so notified Ballou. The unanimous opinion of the Executive Committee was that the arrangement violated the provisions of the Code against discrimination. (Ex. 434.) Savannah advised Ballou that it would abide by the unanimous decision of the directors so far as future business was concerned. (Ex. 434-E.) The directors concurred with the Executive Committee; Code Interpretations covering the matter were adopted. One was designed to prevent tolling for purchasers of sugar, another to regulate tolling for raw producers. (Code Interpretations, Sec. I, p. C1.)

Conforming to these recommendations, the refiners when tolling for raw sugar producers exacted an agreement that the sugar should be sold in accordance with the Code; except for the one Savannah contract, they did not toll for a sugar purchaser.

[fol. 240] Defendants justify the Code rules on the ground that as open announcement was not practicable and tolling in any event could not be availed of by all sugar buyers, it necessarily gave some a discriminatory advantage; further, that if the tolled sugar were not used by the owner in manufacturing his own products but sold, the refiner might become a participant in Code violations, if the sales were made contrary to the Code of Ethics principles.

In my judgment, the rules were in fact adopted principally because of the refiners' fear that the tolled sugar would compete with their own and jeopardize the price structure. (Cf. Ex. 434-E.)

D. Credit Terms

The chief practices in the sugar industry, with respect to credit arrangements, were the four payment plan, split billing and the cash discount. In varying degrees, the Institute has concerned itself with each of these practices; while all are more or less closely interrelated, for convenience, they will be considered separately.

1. Four Payment Plan.

I paraphrase defendants' description. As it was offered in 1928, the buyer was given immediate possession of a carload of sugar. It was treated, however, as the property of the refiner, merely on consignment with the buyer. He was obligated to withdraw or take title to only one-quarter of the carload each week, the purchase price of the amount withdrawn then becoming payable on the usual 2% seven-day terms; he was at liberty, however, to withdraw and dispose of the entire carload immediately, but had to report this to the refiner, as the purchase price of the sugar then actually withdrawn became payable on the usual terms. If the refiner's price declined, the buyer received the benefit of the new price on any unwithdrawn portion of the shipment. If the refiner's price advanced, the buyer could immediately call any "unwithdrawn" balance at the old price. The purchase price of sugar thus called, thereupon became immediately payable. Since about 1930, several changes in terms have been made by various refiners, to render the plan more attractive to the buyer.

[fol. 241] The plan was originated by Savannah some years before the Institute. In 1928, it was offered in Georgia, North Carolina and South Carolina. Defendants cite the extension of the four payment plan, since the Institute as:

"One of the most striking examples of the keen and aggressive competition among the various defendant refiners since the formation." (Fact Brief p. 328.)

In November, 1929, and in December, 1930, it was extended to other southern states or to parts of them. After a trial, it was withdrawn in some sections. But since the filing of the Government's petition herein, it has been extended throughout the entire country, with the exception of the eleven Western states. (Ex. T-17.)

While criticizing the plan as open to abuses practically identical with those resulting from the storage of sugar in customers' warehouses, defendants maintain that:

"With one possible exception which occurred for a brief period in 1929, the Institute has never attempted to define or limit in any way the territory in which the four-payment plan might be offered, although Taylor * * * regarded it as a violation of at least the spirit of the Code of Ethics and closely related to the practice of storing sugar in customers' warehouses, which practice was condemned expressly in the Code of Ethics. The possible exception referred to above consists in a recommendation contained in a report submitted by the Committee on Southern Consignment Points at an Executive Committee meeting on June 6, 1929. In connection with a recommendation that Atlanta be added as a consignment point, the Committee recommended that the practice of trade consignments on the four-payment plan be discontinued in the State of Georgia, apparently considering that with Atlanta a consignment point, the facilities of the four-payment plan would be superfluous or unnecessary." (Fact Brief, p. 331-332.)

[fol. 242] The evidence shows, however, that defendants busied themselves to a far greater extent in seeking to suppress the extension of the four-payment plan. That the withdrawal of Georgia, in the summer of 1929, as a four-payment plan state required some forceful persuasion on the part of the Institute, is indicated by Ballou's letter of

Aug. 1, 1929, to Hershey's representative. After pointing out that a complaint had been received by the Institute from one of its members to the effect that Hershey was still offering the four-payment plan in Georgia, the following sharp comment is made:

"We would call your attention to the fact that the four payment plan was discontinued in Georgia in June upon adoption of the Southern Consignment Committee's Report, copy of which you already have in your files. We are attaching hereto that part of the Report which specifically states under the heading 'Georgia' that the present practice of trade consignments on the four payment plan is to be discontinued." (Ex. 389-A-1.)

But even before this time, the correspondence of Institute members revealed that they were interested in more than merely "open announcements" with respect to the four-payment plan. Thus, a letter from Savannah to the Hershey representative, dated December 18, 1928, stated that Hershey

"seems to be unaware that Florida is a state where the four-payment plan is not permitted." (Ex. 457-R-2.)

After the extension late in 1929 and subsequent withdrawal, Arbuckle pointed out that the boundaries of the territory in which the plan was then to apply still included Pikeville, Ky., and that because of the conditions prevailing in that territory, the result would be that the plan would have to be extended to West Virginia and Ohio. Obviously pursuant to the suggestion of Arbuckle, the Institute circulated among its members the following letter [fol. 243] bearing date, Nov. 29, 1929:

"At the time Northern Kentucky was withdrawn from trade consignment privilege it was intended to withdraw Pikeville, Kentucky, as it is in a chain of competitive jobbing points that are very closely related to Ohio and West Virginia points. It is suggested that Pikeville be considered as withdrawn at once from the list of four payment plan points and that you wire your acceptance of the withdrawal." (Ex. 420-V-1.)

In answering this circular, at least two of the members, Colonial and McCahan, stated that they would withdraw

Pikeville provided the other members did so. (Exs. 420-W-1, 447-E-1.) McCahan evidently did not receive a prompt answer from the Institute; a few days after its provisional acceptance of the suggestion, it inquired "as to the decision regarding the application of the four-payment plan in Pikeville, Kentucky." (420-X-1.) The next day, the Institute's office manager telephoned McCahan that Pikeville had been withdrawn but that: "Sullivan and Cromwell have frowned on our exchange of wires on 11/29 as laying ourselves open to prosecution by Dept. of Justice." (Ex. 420-X-1.) It is perfectly clear that the withdrawal of Pikeville was the result of concerted action on the part of the defendants.

Nor did this end the Pikeville incident. Arbuckle in a letter to the Institute August 19, 1930, recapitulating the circumstances with respect to it, complained that occasionally there were still offerings in that city on the four-payment plan, and added:

"Don't you think it would be advisable to circularize the refiners giving them a boundary that definitely eliminates Pikeville? Knowing the territory as I do, my concern is due to the fact that if the plan was offered in Pikeville, it would spread down the Sandy Valley and through Ashland, Ironton, Ohio, Hunting, W. Va., etc.

"We suggest that you describe the four-payment plan territory in Kentucky as follows:

[fol. 244] 'South of the line drawn east and west through and including, Louisville, Lexington, Jackson and Elkhorn, Ky.'" (Ex. B-8.)

At the Executive Committee meeting of August 20th, to which this letter was referred, it was determined that a circular on the matter should be prepared and submitted to counsel before mailing. So far as appears, such a circular letter was never mailed; on September 10, 1930, however, the minutes of the Traffic Committee note:

"A letter which had been received concerning the status of Pikeville as regards the four-payment plan, was discussed. It was pointed out that the Institute *freight sheet* Kentucky No. 4, specifically covered this point." (Ex. 457-N6.) (Italics mine.)

The next day, the Institute wrote Arbuckle,

"that the only function of the Institute in this matter is to circularize the announcements of the several refiners.

The Kentucky Selling Term sheet No. 4, issued June 2, 1930, covers the objections you have raised. Apparently, the refiners selling in Kentucky have stated that they will not offer the four-payment plan at Pikeville.

The notation on the rate sheet reads as follows:

'Note: The territory in which four payment and deferred payment plans have been announced is the territory south of the Louisville-Lexington line (including these two cities) which passes through Williamson, W. Va. The plans will *not* apply at Williamson or any points south of it along the Big Sandy River.'

The plans are *not* in effect at Pikeville."
(Ex. C-8.) (Italics in original.)

There are other indications, too, that the refiners were concerning themselves with the regulation of the four-pay-
[fol. 245] ment plan. An extension of the plan in a wide territory, which was later withdrawn, occurred early in 1930. In connection with this, the Vice-President of Pennsylvania on Feb. 5, 1930, wrote to the P[illegible] of Savannah:

"I suppose you will be up at the meeting next week. Hell seems to be breaking loose in the West in regard to the extension of the four-payment plan and 3% discount. The whole situation does not look very cheerful to me. Perhaps we will be able to get things ironed out at the meeting * * *" (Ex. 420-Y-1.)

The minutes of the directors meeting of February 13, 1930, contain no entry with respect to four-payment plan matters. But the next weekly issue of Willet & Gray, on February 20, 1930, carries announcements by American, Spreckles, McCahan, Pennsylvania all dated Feb. 14, and Colonial dated Feb. 15, that they were withdrawing four-payment plans in some Western states.

The attitude of members may be indicated by a letter from Godchaux to the Institute dated March 6, 1930, stating:

"Referring to your [request] * * * for suggestions * * * of agenda for the meeting of March 13th * * * the most important topic * * * is the necessity for determining whether the discussion held at the meeting of the first week of December as to announcement of changes of terms was intended to be observed.

"*I consider that one of the most important matters discussed at that meeting was the adoption of a policy by all members that before they made any drastic changes in the selling terms, they would, if possible, await a Directors' Meeting at which this question could be discussed by all at Interest,* or if the matter was of vital importance, that a special Directors' Meeting would be called for a discussion of same before action were taken, rather than after the taking of the contemplated action.

[fol. 246] * * * I have specifically in mind * * * action taken by * * * American * * * in announcing the Four Payment Plan in Texas, which * * * spread all through the United States, and was then withdrawn and left in effect only in the original territory where it applied." (Ex. 394.) (Italics mine.)

In March, 1930, the Directors created a Southern Enforcement committee; the matter of the lack of uniformity in four payment contracts was referred to it for investigation and recommendation. (Ex. 21-26 pp. 405, 407.) The subsequent minutes of this committee with respect to this matter are not illuminating, but, in my judgment, the evidence shows quite clearly that the Southern refiners must have been concerning themselves with the substance and extent of the four-payment plan rather than, as defendants would create the impression, merely with definitions. (Cf. Ex. 420-M2.)

I have gone into this and some other matters more fully perhaps than their intrinsic importance justified because of the light cast by the documents on the motives that actuated defendants and the methods adopted by them.

In my judgment, they concertedly sought substantially to limit the four-payment plan, and until the bill in this suit was filed, successfully, at least in part.

2. Split Billing.

The essential and undisputed facts are that the practice of split billing was originated by the California refiners in

the middle western territory to offset the disadvantages resulting from the difference between the 80,000 lb. carload minimum prescribed by the railroad tariffs on shipments from the Pacific Coast and the 60,000 lb. minimum from the Atlantic Coast and Gulf points; a purchaser from a California refiner would have to take an additional 20,000 lbs. to secure the carload rate. To overcome this, Pacific Coast refiners made two billings to buyers in competitive territory, the first for 60,000 lbs., payable within seven days after arrival, and the second for the balance, payable within fourteen days after arrival. Elsewhere split billing, while not commonly practiced, was occasionally used by some refiners as a form of secret concession.

[fol. 247] Defendants, although stating in effect that the practice "has always been regarded in the sugar industry as unsound and without economic justification" (Fact Brief, p. 381), maintain that the Institute "took no position either for or against deferred payment terms as such". (Fact Brief, p. 381.) It is perfectly obvious, however, that the attempt to prevent the spread of split billing to territories where there was no difference in the carload minima, is a definite position against the deferred payment plan. Split billing was condemned in Code 3 (b).

Plaintiff contends that there was an understanding among defendants against split billing and that the Institute used coercive tactics in preventing its spread. Defendants' position is that they merely subscribed to the economic wisdom of Code 3 (b); that their only obligation was to adhere to it until deviation therefrom was publicly announced. In my judgment, the contention of the Government is clearly supported by the evidence.

The first instance of Code 3 (b) violation was by C. & H., which at the end of February, 1928, engaged in split billing in Texas because other refiners competing in that area had an advantage in that they could make up carloads of sugar and syrup which two commodities together enjoyed a carload rate.

Judge Ballou, seeking to persuade C. & H. to cease the practice, pointed out that:

"If members were free to violate the Code of Ethics for reasons such as advanced by you, the Institute would not last a week." (Ex. 386-A.)

Shortly thereafter, the acting president of C. H. visited New York and "following a personal interview" the Institute informed the members that C. & H. was discontinuing, on all new business, split billings on 60,000 lb. cars. Ex. 386-B.)

A year later, C. & H. resumed it in Texas. At that time, the reason given by them to the Institute was its necessity in order to compete with refiners who unlike C. & H., carried consigned stocks there. Thereupon, at the directors meeting of June 27, 1929, the following resolution was adopted:

[fol. 248] "Certain competitors are admittedly split billing on sixty thousand pound cars at El Paso and adjacent points in violation of the Code of Ethics of their own association . . . in order to meet the competitive situation thus created, members of the Sugar Institute are hereby authorized to split bill sixty thousand pound cars in the same territory. This authorization shall be withdrawn whenever the Executive Secretary shall notify the members concerned that such competitive practices have ceased." (Exs. 21-26, p. 267.)

Two weeks later, the Institute circulated the following announcement among its members:

"Competitive practices justifying split billing sixty thousand pound cars in Texas have ceased as to all points except El Paso. Institute members will therefore discontinue such split billing at so-called adjacent points." (Ex. 420-E-2.)

A few months later, the carload minimum from the Pacific Coast was reduced to 60,000 lbs. At the same time, some of the refiners wished to extend their business into some Middle Western states where intra-state carload minima were lower than the 60,000 lb. interstate minimum. These were states in which there was very substantial beet sugar competition and the Domestic Sugar Bureau, in its Code, had made provision for split billing. The entire situation was cleared up in the following letter from the Institute to all of its members:

"Effective September 1st, 1929, the carload minimum from the Pacific Coast was reduced from 80,000 pounds to

60,000 pounds. There is therefore no longer 'an 80,000 pound minimum rate' as referred to in the Institute's Code of Ethics.

"Under these circumstances, members are Authorized to meet the competition on split billing as stated in the announcements of various members of the Domestic Sugar Bureau.

[fol. 249] "It is recommended that the announcement of the California & Hawaiian, dated September 11, 1929, and circulated by the Sugar Institute under date of September 20, 1929, be taken as the authoritative statement of present terms and conditions by those desirous of meeting these split billing terms." (Ex. 420-F-2.)

While originally the split billing plan developed to take care of differences in carload minima, yet, as the C. & H. situation in Texas shows, the practice could very conveniently be applied as a competitive device to meet other forms of competition. Defendants have shown no evil in the practice, except to the extent that, prior to the Institute, it may have been used to give a secret concession, which, however, could have been prevented without prohibiting the practice itself.

The defendants point out that this entire subject is now unimportant because as the Four Payment plan has been effective since February 10, 1932, in all states where split billing was formerly practiced, there is no longer any need for it. This extension of the Four Payment plan, however, occurred subsequent to the filing of the present suit; the government may well fear further concerted action in respect to split billing unless restrained.

3. The Cash Discount.

Plaintiff complains of an alleged agreement by defendants fixing at 2% the cash discount to purchasers. Defendants insist and the government practically concedes that the discount had always been 2%. The evidence shows quite clearly that it was taken for granted among the defendants that this rate would be continued. A uniform contract form, recommended by the Institute and sent out to members in 1929, carried such a provision. The strongest evidence of concerted effort to maintain the rate are Taylor's letters to Lowry and Lamborn, already referred to in connection with the subject of delivered prices; he said:

[fol. 250] "* * * It is desirable that we should know that * * * your publicly announced price basis will be less 2%. * * *" (Exs. 324, 545.)

As already noted in other aspects of the case, the post-Institute period was one in which theretofore stable terms either threatened to or did break down, probably because of the elimination of the unfair competitive devices, the secret concessions. During the post-Institute period, a 3% discount was announced twice; it was effective, however, for not more than ten days. In this connection, Pennsylvania's letter to Savannah, quoted in the discussion of the four payment plan, should be noted. (Ex. 420-Y-1.) The 3% discount there referred to, appears to have been withdrawn before the directors meeting of February 13, 1930. See Willett & Gray, issue of Feb. 13, 1930. The inference of concerted action with respect to the withdrawal of the four payment plan already suggested could, therefore, scarcely be made with respect to the withdrawal of the 3% discount.

Nevertheless, the Institute recommendations and the letters to offshore interests must have had some effect in keeping the discount stabilized at 2%. Moreover, it is unlikely that defendants did not appreciate that the elimination of secret concessions would tend to cause competition to manifest itself by other means; the steps taken to preserve the 2% discount must have been designed to prevent competition in this respect.

Defendants' leading activities regarding the cash discount, did not however, concern the rate but the time within which payment must be made. Traditionally this was seven days after arrival by rail or seven days after withdrawal from consignment, with three days of grace; in all "ten days had practically become a custom of the trade." It was hoped to abolish the grace period. (Ex. 21-26 p. 32.) But when an Institute committee recommended a list of uniform terms, a ten day period was suggested. (Ex. 21-26, p. 190 A.) A Directors meeting finally agreed to recommend seven days. (Ex. 21-26, p. 207.) Defendants assert that the three days of grace has nevertheless been continuously allowed.

The important question, however, was as to when the discount period should begin on shipments by differential [fol. 251] routes, especially in the Middle Western terri-

tories served by many such routes, some accessible to Eastern and some to New Orleans refiners. It occupied defendants intermittently at least until delivered prices were put into effect in that territory. A brief discussion of this situation will serve to show that the "uniform definitions" agreed upon by defendants went much further than merely to embody, as defendants contend, "substantially the existing practice and the most liberal provisions offered by any member." (Fact Brief, p. 310.)

Early in 1928, when the Institute was endeavoring to enforce Code 3 (c), Godchaux, a New Orleans refiner, complained that Eastern refiners were soliciting business by the rail and lake route on the all rail discount terms of 2%, 7 days after arrival. Godchaux in shipping by Mississippi barge had theretofore quoted 2%, 14 days after shipment; because of slowness of barge service,[20] these terms were obviously less attractive than those of Eastern refiners via differential routes. Godchaux wired the Institute that to meet the Eastern competition, it should be privileged to "quote during season eastern water rail movement barge shipment terms payable seven days after arrival." (Ex. 457.) Judge Ballou, in circulating this complaint among New York refiners, suggested that Eastern differential shipments should carry no more favorable terms than New Orleans barge shipments. (Ex. 457.) A few days later, he wired Godchaux:

"It is the opinion of the Executive Committee that shipments to Chicago from Atlantic Ports over differential routes should not carry any more liberal terms of payment than those in effect from New Orleans stop solicitation of such business based on payment after arrival has not been authorized and will be discontinued * * *" (Ex. 457-B.)
[fol. 252] The next day, Ballou issued a circular to the New York, Philadelphia and Boston refiners, calling a special meeting of the directors who represented them, together with their sales managers and traffic managers, to discuss

"freight application at Chicago and Lake ports during season of open navigation,"

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[20] Average transit time by barge New Orleans-Chicago, 20 days. Ex. L-4.

and requested therein that they "make no announcement as to time of payment or shipments over differential routes at customer's request until after this conference." (Ex. 457-A.) According to Place, of McCahan's, in reporting to his superior officer, Ballou there suggested that Eastern refiners should quote terms 2%, 14 days after shipment on differential route deliveries. "The purpose of this" as Place put it, "was to discourage shipments over this route thereby attempting to maintain the 'all rail' basis into Western markets." (Ex. 457-C.) Place feared that if Godchaux quoted "arrival terms" on barge deliveries, the attractiveness of low rates and liberal credit for such shipments would necessitate Eastern refiners breaking down freight applications in the middle west. To make certain that the opportunities of the New Orleans refiners would be equalized, "pressure" was brought to bear upon McCahan to quote 2%, 10 days after shipment on rail and lake movements, on the ground that, by thus shortening the Philadelphia refiners' credit terms, New Orleans with its barge service, slower than the rail-lake [21] route to Chicago, could more readily compete by offering terms, 2%, 14 days after shipment.

In May, 1928, freight applications did break down at some Great Lake points to the Philadelphia rail and lake basis, despite the Institute's efforts to prevent it. To meet this competition, New Orleans refiners quoted 2%, 7 days after arrival on barge shipments. McCahan expressed to the Institute the fear that quotation of such terms on New Orleans barge shipments "will inevitably lead to breaking down basing rate to barge basis." (Ex. 420-L.) A few [fol. 253] weeks later McCahan's "fear" materialized in an announcement that it would sell at the New Orleans barge rate in certain Western states. "At the insistent request [of] Judge Ballou," however, McCahan withdrew this announcement the same day (Ex. 457-T); a special meeting of the Executive Committee held the following day "prevailed" upon that company "to continue indefinitely the withdrawal of barge rate application Western territory." (Ex. 457-U.)

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[21] Average transit time from the east via rail and lake route to Chicago seven to eight days. (Ex. L-4.)

Nevertheless, Godchaux apparently continued to quote "arrival terms" that is, 2%, 7 days after arrival, on barge shipments, for early in 1929 when the comprehensive list of "uniform terms" had been developed by an informal Institute committee, Godchaux stated that "payment terms on barge shipments into territory taking lake and rail selling basis should be the same as at present, that is, based upon arrival;" the uniform terms were amended to meet this objection. (Ex. 21-26, p. 190 as qualified by R. 8914-15.) Finally, however, on April 11, 1929, Godchaux withdrew his objection (Ex. 21-26, p. 233), because, as Place testified (R. 8918), Eastern refiners, in March, 1929, had also begun to quote "arrival terms" on all water shipments, which they had theretofore refrained from doing and which the "uniform terms" recommended by the Institute condemned. This action nullified the advantage that Godchaux had first obtained.

To treat in detail the comprehensive set of "uniform terms" actually recommended by the Institute, would serve no useful purpose. The foregoing discussion sufficiently shows that the defendants were much more concerned with "equalizing" their opportunities, than they were with devising "uniform definitions". Credit terms on differential shipments from New Orleans and the east were the subject of keen competition between the refiners. I find no justification for the restraints which defendants obviously sought to impose thereon.

Defendants urge further that these Institute recommendations are now of no importance because the breakdown of the freight structure resulted in the "discount period being universally reckoned from the date of arrival on all types of shipments . . . the most liberal practice in the history of the industry". (Fact Brief, p. 314.) The [fol. 254] breakdown in freight structure in the Great Lakes area, the important area so far as this matter is concerned, occurred, however, after the instant suit had been brought. There is in my judgment a very substantial danger that unless restrained, defendants may again engage in activities similar to those hereinabove described.

E. The Price Guarantee

Prior to the Institute, refiners offered in some localities a guarantee against price decline between the date of en-

tering the contract and that of delivery. The California refiners especially were favorably disposed to such contracts because they served to equalize the advantage enjoyed by the other refiners in the shorter transit periods from eastern and southern points. Plaintiff contends that the restraint by defendants of this type of contract provision is unreasonable.

Defendants admit disapproval by the eastern and southern refiners of guarantees but on the ground that they were speculative and might result in heavy losses to the refiner. Lowry's testimony indicates, however, that an astute refiner could readily avoid such losses by hedging operations on the Sugar Exchange. (R. 522-23.)

While there is some evidence that the eastern and southern refiners withdrew the guarantee late in 1927, Judge Ballou, in a letter stated that it was withdrawn "at the beginning of 1928" (Ex. 467, p. 8.) California and Hawaiian, however, continued to offer it, thereby causing considerable concern to those that had discontinued it. During the early months of the Institute, efforts were made to induce C. & H. likewise to withdraw the guarantee and in May, an Institute Committee conferred with the president of that company to this end, but without success.[22] Thereupon the eastern and southern refiners reinstated it. They were careful to go no further than absolutely necessary in order to meet C. & H.'s then terms, pursuant, as [fol. 255] plaintiff contends, to an agreement. Defendants deny the agreement and insist that each of them acted independently in adopting an individual policy to this effect. Plaintiff relies on the following excerpt from the minutes of the Executive Committee meeting of June, 1928, as the chief evidence of an agreement or concerted action:

"The question of the form of guarantees which had been generally announced for certain territory was discussed. Mr. Abbott, General Counsel for the American, was asked to attend the meeting and to express his views."

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[22] Sometime later in explaining C. & H.'s general policies to the Institute, the president of that company wrote:

"If we have done anything that seemed contrary to the policy adopted by the Institute, you must admit (and I know you do) that it has been done openly—*the Guarantee for instance.*" (Ex. 442-S.) (Italics mine.)

"It was pointed out that the C. & H., whose guarantees created the competitive situation now being met, was selling on the Eastern lake and rail basis in the competitive territory. Nevertheless it did not guarantee on barge shipments but required the buyer to elect, at the time of entering his contract, between a guarantee contract calling for rail deliveries only, and a non-guarantee contract which permitted barge shipments. Mr. Abbott stated that the policy of the American would be to follow the principle of this practice, confining routings on guaranteed contracts to all-rail deliveries and such differential routings as were comparable in rate and in time of transit to deliveries from the Pacific coast * * * Routings by the slower routes, such as Mississippi Barge Lines, all-water routes and the C. A. T. Line would not be available on guarantee contracts both because of the time element and because their lesser rate would give the buyer a freight preference as well as a guarantee in the same contract.

* * * * * * *

"No action was taken as a result of this discussion but each member reserved the right to announce his own detailed guarantee terms after further consideration." (Ex. 21-26, pp. 75-76.)

The policy outlined by American became the policy of all the eastern and southern refiners. Thus while prior to the Institute, guaranteed contracts had been entered into by refiners for shipment over the Mississippi Barge Line, [fol 256] subsequent to the Institute and until some time in May 1931, a customer could not obtain the guarantee on such a barge shipment. Somewhat similarly, in the case of the C. A. T. Line, a differential route available to eastern refiners, while some pre-Institute guaranteed shipments had been made over that route, they were discontinued for a considerable period of time during the post-Institute period. Representatives of Federal, American and Arbuckle referred to the Institute, officials of the C. A. T. Line who called upon them to have guaranteed shipments made over that route. Judge Ballou wrote C. A. T. Line that the eastern refiners

"did not wish to take any action which would invite retaliation to the extent of a guarantee on barge shipments from New Orleans * * *

"Routings by the slower routes such as the Mississippi Barge Lines, all-water routes and the C. A. T. Line would not be available on guarantee contracts both because of the time element and because their lesser rate would give the buyer a freight preference as well as a guarantee in the same contract." (Ex 132.)

He added that "competition" by the C. A. T. Line, because of its shorter transit time in comparison to the Mississippi barge line plus its "unrivaled" freight storage facilities was

"a cause of grave concern to those refiners who have not a corresponding route to offer their customers. It seemed to be the general opinion that if the Eastern refiners should add a guarantee to this freight preference they would not only be going beyond the competitive situation which they were trying to meet but would invite further breaking down of the rate structure by both the Pacific Coast and the New Orleans refiners in an endeavor to equalize the new condition."

He further sought to make clear in this letter, however, that he was simply explaining the views of the individual refiners; that this matter had never been the subject of a recommendation by the Institute; that C. A. T. was free to go to any of the shippers and persuade them to change their policy; and that the only responsibility to the Insti- [fol. 257] tute was to make public announcement of any change in terms. (Ex. 132.)

But plainly during the early months of the Institute, eastern and southern refiners acted concertedly in refraining from entering into guarantee contracts. The discussion at the meeting in June, 1928, demonstrated to them how far they had to go to meet C. & H. and the dangers to the general Institute program, if they went any further. Subsequently, the courses followed by the individual defendants in offering a restricted guarantee were identical. Such conduct naturally resulted from the careful preparation made therefor under Institute auspices and can not be deemed the independent action of the several refiners.

In justification of the eastern and souther refiners' disapproval of the guarantee, defendants urge that they were troubled by its discriminatory nature. They say that as

the guarantee was offered to customers in some localities and not in others, unfair geographical discrimination resulted. This argument is obviously an after-thought. Defendants' activities with respect to delivered prices have demonstrated beyond question that they were not genuinely interested in eliminating geographical discriminations.

F. Containers and Used Bags

The petition alleges and the answer denies that

"Defendants have agreed to restrict and limit, and have concertedly restricted and limited the use of certain varieties of bags and other containers used in the packing, delivery, and sale of sugar."

Defendants added an admission

"that the Institute recommended to members that they discontinue the practice of making an allowance to customers for the return of used bags, or for the use of customers' bags, and recommended to members that they discontinue the use of unbranded bags, for the reason that such practices re- [fol. 258] sulted in discrimination between customers, or were so open to abuse as to be likely to result in and promote such discrimination, and for the reason that such practices were unbusinesslike."

The most important restriction was the prohibition of any allowance to customers for returned used bags. Certain other activities may first be disposed of.

From the minutes of the directors meeting of February 7, 1928, it appears that

"The matter of selling sugar in bulk was discussed, one refiner stating that he had in contemplation something in the nature of a tank car, while another stated that he was figuring on ton containers to be loaded on trucks. It was the consensus of opinion that deliveries in bulk would further add to the complexities of a business where standardization and simplification of packages were more needed than further diversity and that the Institute should recommend that experiments in selling in bulk, should be discouraged." (Ex. 21-26 p. 19.)

This "consensus of opinion" was embodied in a code interpretation, Sec. XI, p. 1.

In December, 1928, the Executive Committee recommended a resolution, which shortly thereafter appeared as a Code Interpretation, as follows:

"New and Unusual Methods

"All propositions submitted to or originated by a member of the Institute, involving new or unusual methods of the sale of sugar in any form (not including refiner's syrup, table syrup, invert syrup, or molasses) should, before acceptance, be submitted to the Executive Secretary for consideration as to their possible effect as involving discrimination, or otherwise violating the Code of Ethics." (Code Interpretations, Sec. I, p. A1.)

[fol. 259] So far as appears from the record, the only subsequent reference to this provision is in the minutes of the Executive Committee for February 21, 1929:

"Two refiners reported that they had been approached upon the proposition of packing sugar in 300 pound bags with paper lining and that, while the proposition had been declined in both instances, they wished to report it under the head of a new and unusual sales proposition." (Ex. 21-26, p. 212.)

The precise purpose of the proposal for packing sugar in bulk or in paper containers does not appear from the record. It seems quite obvious, however, that these methods must have been designed to effect economies and greater convenience in bagging and/or shipping. The discussion and "concensus of opinion" of February 1928, and the resolution of December 1928, indicate the Institute's determination to discourage "experiments" in this direction.

The restrictions on used arrangements also show that the Institute entirely disregarded any interest the public might have in the development of more economical methods in the distribution of sugar.

Between 1923 and 1925, a limited practice had developed on the part of some refiners of making to certain customers an allowance for used bags. Two methods were used:

(1) only the one initial charge was made for refiners' bags if after using their contents the customer would return them to be refilled;

(2) no bags charge was made if the customer supplied his own bags.

The economic advantage of the second method lay in the fact that the customer, in supplying his own containers, would purchase a better quality of bag, which could be refilled oftener than the refiner's bag. The evidence shows that the re-use of old bags would result in an average saving to the customer of from 5 to 10 cents for each bag of sugar purchased, a very substantial sum, without material expense to the refiner.

At the directors meeting of February 7, 1928,

[fol. 260] "The matter of making an allowance on used bags returned to the customer or on the reuse of customers bags was * * * debated. It was pointed out that unless such allowance represented the exact value of used bags, which it would be very hard to determine, it would constitute a special allowance and that in any event the practice was so open to irregularities and abuse that it should be discouraged." (Ex. 21-26, p. 19.)

This expression of opinion resulted in the Code interpretation:

"The making of an allowance on used bags returned by the customer or for the use of customer's bags, constitutes a special allowance and the practice is so open to irregularities and abuse that it should be discouraged." (Code Interpretations, Sec. 1, C1.)

Since the Institute, refiners have from time to time received requests from customers for used bag allowance; the Institute as well as the Domestic Sugar Bureau, cooperating with each other, took steps to make certain that none of their members granted it. At the January, 1931, directors meeting, National's proposal to amend the Code Interpretations so as to permit of an allowance, was "unanimously" rejected. (Ex. 21-26, p. 615.)

Defendants' position is thus stated:

"Allowances for used bags are not in themselves harmful to the industry or to anyone engaged in it; they only are harmful when distributed as discriminatory favors to particular customers and it is only for that reason that they

are condemned by the Institute. The difficulty is that as a practical operating matter it is impossible to handle returned bags from all customers." (Fact Brief, p. 398.)

This "impossibility" is said to be due to the inadequacy of refiners' facilities for keeping each customer's bags separate and assorting and storing them.

Defendants also insist that:

[fol. 261] "there was never any 'substantial competition' in the sugar industry with respect to used bag allowances. purchasers of sugar in one hundred pound bags have always either made use of the empty bags themselves or disposed of them to second hand dealers." (Fact Brief, p. 404-5.)

Any practice of granting an allowance was of very recent origin. The plan had been first hit upon by Lowry, who operated Pennsylvania under a lease arrangement up to the year 1927. He made such allowances to the National Biscuit Company, but, as he testified:

"I am not sure that I would not have extended that had we continued the management with the Pennsylvania, because the thing in itself has some merit. It is a question of judgment. I always like savings and where savings can be effected without costing anybody anything, I think it a good thing to do." (R. 543.)

Other refiners adopted somewhat similar arrangements. Among them were National, American and some of the beet sugar manufacturers. If, as Lowry testified, the plan did have merit, the ban upon it in 1928 prevented its development. As there never were any open offers to the trade to make used bag arrangements, and as the plan for used bag allowances never had any real trial, it is largely speculative as to whether or not the refiners could have accommodated those customers who might wish to take advantage of it. If facilities of individual refiners proved inadequate to accommodate all customers who sought an allowance, they might have offered it openly to a special class whose business methods were such that they could use the privilege without inconvenience to the refiner. The resulting discrimination would be entirely legitimate if the classification were fairly made. Or the refiner might have offered the allowance to all customers up to the limits of his capacity.

Or perhaps because the plan was still in an experimental stage and because on that account individual refiners might not have been able to tell how far they could go in offering it, might have been necessary for each to enter into arrangements for the allowance, on the basis of private negotiations. But even such arrangements need not be unfairly discriminatory. Moreover, publicity with respect to such [fol. 262] transactions after they are closed, would make unfair discrimination virtually impossible because competition among purchasers was so keen that if there were no economic justification for the discrimination, the refiner would have had to grant the same privilege to other customers in a similar position.

The evidence indicated that merchandisers would probably have found it impracticable to save their bags, but merely because some customers could not have taken advantage of an offer of an allowance is no fair reason for denying the privilege to those who because of the nature of their business would be able to profit thereby.

Defendants' real objection was that the used bag plan might conceivably be made a cloak for secret concessions, although it does not appear to have been so employed prior to the Institute and Lowry testified that so far as he knew, it had never been used for that purpose. Neither the open announcement method for such a plan nor any other interested defendants. They preferred to deny the privilege to all, relying for justification on the entirely speculative possibility that the allowance would necessarily prove discriminatory. Thus under the guise of preventing discrimination, defendants closed the door to a practice which promised substantial economies in sugar distribution.

G. Private Brands

Prior to the Institute, some of the refiners packed sugar under private brand names for various customers. Defendants assert that the practice "has always been very limited." (Fact Brief, p. 373.) However, sometime in 1929, the vice president of C. & H., in a letter to the Domestic Sugar Bureau said that it was "growing". (Ex. K-6.) The Government charges that defendants concertedly restrained it. They, on the other hand, while admitting "that the tenor of the discussion at Institute meetings * * * was against" it, seek to show that they did no more than try to discourage it. (Fact Brief, p. 375.) In fact, they went

much further. (See for preliminary activities in this matter Ex. 21-26, pp. 199-200; Executive Committee Meeting; Jan. 1929; p. 210; Directors Meeting, Feb. 1929, p. 270; Executive Committee Meeting, July, 1929.) In July, 1929, [fol. 263] Judge Ballou circulated a question-aire among the members asking whether and if so for whom, they were packing private brands, the amount of such business, whether a service charge was made and other matters. Information thus obtained was to serve "As a basis for recommendations." (Ex. 21-26, p. 272; see, too, Ex. 21-26, 281, 313, Aug. and Oct. meetings.) At the November directors meeting, "it was the consensus of opinion that in the interests of the industry earnest efforts would be made on the part of all refiners engaged in the business of packing private brands to reduce such accounts, and that no one should accept any new private brand business without personally bringing the subject to the attention of a Directors' Meeting." (Ex. 21-26, p. 333.) In Feb., 1930, at an Executive Committee Meeting, "The question was asked *whether it would be considered a violation of the Institute's recommendations* for refiners to pack new brands for exclusive sale by certain distributors. * * * It was moved and unanimously voted that Exclusive Brands be classified as coming under the same rulings and recommendations as Private Brands." (Ex. 21-26, p. 396.) (Italics mine.)

This together with other evidence reveals at least an understanding on the part of defendants not to accept private brand business without first reporting it to their competitors, that such reports were in fact made, and that the purpose thereof was to afford opportunity for applying concerted pressure against acceptance. The restraint is made more apparent by Place's statement that at least some refiners felt "that private brands were a good thing and they wanted to continue it." (R. 7697.)

Moreover, the reasons given by refiners on several occasions when they advised the trade that they could not pack private brands, are illuminating. These were that the "refiners recently decided not to pack any private label goods" (Ex. 420-T-1, Pennsylvania letter of August 1929, signed by Office Manager); that "rules of the Sugar Institute forbid" it (Ex. 294, Revere letter of May 1930, signed by Credit Manager); that "it is contrary to the Code of Ethics of the Sugar Institute" (Ex. 413-L, Savannah letter of Feb. 1932, signed by Sales Manager). Defendants as-

sert that these statements were made simply for the purpose of providing the individual refiners with an alibi, by shifting responsibility to the Institute. However, they were made by responsible representatives of the respective refiners. The evidence does not show that the statements [fol. 264] were false. On the contrary, they are in line with the informal recommendations which issued from the various meetings. Moreover, Savannah's letter was written subsequent to Cumming's speech in May, 1931, in which he cautioned members against shifting responsibility to the Institute in matters as to which defendants acted independently. (Ex. 21-26, p. 654.) In such circumstances, I cannot accept defendants' explanation. The statements, in my judgment, throw light on the actual purport of the discussions and recommendations referred to in the minutes of the various meetings and justify the conclusion of an understanding among defendants that private brand business was not to be accepted generally if at all.

In justification of their conduct in this matter, defendants argue (1) that private brand business was discriminatory in that it could not be accepted from all customers (2) that it involved deception because all defendants' sugars are in fact the same quality (3) that it was an expensive and wasteful practice.

(1) Defendants have utterly failed to prove that private brands could not have been used for all customers desiring them. That the demand therefor is limited, as defendants assert, is all the more reason for packing and openly granting them.

(2) The argument that private brands are deceptive is plainly an afterthought; they are neither more nor less deceptive than the brand names under which defendants sell their products.

(3) Doubtless the practice does involve some trouble to refiners who engage in it, inasmuch as it necessitates keeping a separate stock of containers for each customer using a private brand. But some containers would have to be provided in any event. There is no substantial showing that the printing of a name different from the refiners own brand or the additional handling involved would entail substantial expense. In any event, there is no reason why individual refiners if they choose, might not make a service

charge for such business, if it in fact involves additional expense.

I find no substantial justification for the restraint; defendants' fear that the practice might be used as a means of granting discriminatory favors motivated in part at [fol. 265] least the action taken. The possibility of such abuse is on this record entirely speculative. In my judgment, packing under private brands is plainly a legitimate competitive device. As to whether or not it is an advisable one, opinions may, as those of the several defendants did, reasonably differ. A fear that the practice may become burdensome to them and may be abused does not suffice to make the restraint of competition reasonable.

H. Second-Hand Sugar or Resales

Plaintiff contends that the defendants have unreasonably restrained sales of "second-hand" sugars, known as "resales".

A second-hand sale occurs when a purchaser, usually before he has withdrawn his sugar under the contract, sells all or part of it. Resales by the original purchaser are ordinarily made to dispose of sugar either contracted for in excess of his needs or bought as a speculation, to sell on a rise. Resales are always made at a differential below refiners' prices, because customers prefer on equal terms to buy direct from the refiner.

Prior to the Institute, refiners at times used an ostensible resale transaction to cloak what was in fact a secret concession. Thus after a favored customer had contracted for an amount known to be in excess of his needs, the refiner might offer to resell to another customer after the sugar had been withdrawn, thus saving him the cost of brokerage on the resale. If the sugar had not as yet been withdrawn and the market had dropped, the refiner would simply cancel the contract with the customer or credit him with a similar amount of sugar, to be applied on a new contract, thus saving him the loss that he would have incurred if he had been compelled to withdraw the sugar at the original higher price; the refiner would then record the transaction on his books as a resale, for the purpose of making it appear that no concession had in fact been given.

Defendants contend that the steps which they have taken to regulate second-hand transactions have been solely for the purpose of preventing these "fictitious" resales. They

[fol. 266] assert that this was the purpose of Code 3 (h), reading, as they quote it,

"The Institute condemns * * * as unethical, except when practiced openly * * * (h) the sale of second-hand sugars by refiners."

They also say that

"All other recommendations of the Institute will be found expressive of this same principle—to preserve the legitimate interest of the trade in the resale privilege but to eliminate the fake and fictitious resale." (Fact Brief, p. 378.)

But Code 3 (h) on its face went further. In addition to condemning refiners' resales as unethical "except when practiced openly", it also states that they are "in any event * * * wasteful and unbusinesslike"; it states, too, that if resales be "uniformly employed they amount to a general price concession which should frankly take the form of a price reduction". It is apparent, therefore, from the Code itself that defendants were interested in discouraging refiners from making legitimate as well as fictitious resales.

Defendants' other activities with respect to second-hand sugars may be gathered from the Code Interpretations. It was provided:

"In the case of the sale of second-hand sugar, the sugar should, without exception, be invoiced to the original buyer."

* * * * * * *

"No resales of unwithdrawn sugars should be recognized after the due date of the contract.

"In case specifications have been received on or before the due date, but shipment has been delayed by the inability of the refiner to make prompt shipment, changes in the specifications may be made at the request of the customer as well as changes in destination to points where the cus-
[fol. 267] tomer is known to be in business, but no other change in destination." (Code Interpretations, Sec. VIII, p. 1.)

With respect to the provision requiring the sugar, regardless of resale, to be invoiced to the original buyer, plaintiff

does not answer defendants' argument that the purpose is to have the bookkeeping entries accurately portray the transaction as it is if it be a bona fide resale and not a fake one to conceal a secret concession. While I concur in defendants' contention that this involves no substantial restraint, a substantial restraint is imposed insofar as the Code aims to prevent the refiner from negotiating a legitimate resale for the customer. Defendants have failed to justify the prohibition of such a transaction.

Nor have the defendants justified the Code Interpretation against recognizing resales after the due date of the contract. While each refiner individually might refuse to honor the customer's contract assignment, made subsequent to the due date thereof, there is no justification in my judgment for an agreement or concerted action to prevent individual refiners from allowing their customers to make such assignments. There is even less justification for the recommendation where delay is due to refiner's inability to make prompt shipment.

A further restraint on resales may be described in the terms of the resolution adopted with respect thereto and made effective by the defendants in 1929:

"If a refiner has more than one price and/or different terms (including guarantees) either in the same territory or in different territories, at the time of entry of an order, buyer shall elect and specify at that time the price and/or terms desired. Delivery shall be made only within the territory in which said price and/or terms were applicable at time of entry of such order. The territory to which such price or terms applies shall be incorporated in the contract, either specifically or by reference in the contract to previous announcement. No exception to this rule shall be [fol. 268] made in instances of any resale permitted by a refiner." (Ex. 21-26, p. 214.)

The purpose of this resolution is indicated by the minutes of the Executive Committee meeting in which the need therefor was suggested. It is there recorded that—

"Attention was called to the fact that the terms of some refiners' contracts would permit the sugar booked under a guaranteed contract to be resold in non-guarantee territory, which resale would carry the privilege of slow shipments not permitted by the original contract. It was the

consensus of opinion that this privilege would allow the original buyer a discriminatory advantage to be taken when the market was strong while reserving the guarantee when the market was weak. Attention was again called to the necessity, in order to prevent such discrimination, of requiring the buyer to elect definitely at the time of entering the contract between the guarantee form, where such was available, and the non-guarantee form, and to allow no subsequent switching by resale or otherwise." (Ex. 21-26, pp. 196-197.)

Defendants have likewise shown no justification for this resolution. Anything discriminatory which it sought to prevent resulted from the fact that individual refiners had different prices for different territories or different terms for different or the same territories. I can find no reasonable justification for defendants' efforts to minimize the effects of these differences as long as opportunity is fairly granted to secure diverse terms and prices.

One further action was taken by defendants with respect to the resales; at a directors meeting in June, 1929, the following resolution was adopted:

"For the prevention of discrimination arising out of irregular brokerage practices, the Institute recommends to [fol. 269] its members that full brokerage should be paid upon all resales and that members should advise their brokers to this effect." (Ex. 21-26, p. 268.)

This was later rescinded as not practicable. (Ex. 21-26, p. 322.) Subsequently, however, in January, 1931, a resolution was adopted by the directors amending the pledge which the Institute contemplated requiring brokers to sign, and providing that if "in any resale of any sugar * * * the brokerage commission charged is at a rate lower than that charged by the broker to the refiner" the broker should thereupon suffer a certain forfeiture to the refiner. (Ex. 21-26, p. 617.) The Vice-President of Godchaux, in commenting upon this amendment in a letter to the President of that company, said:

"I believe that this amendment of the brokerage pledge is going to be very beneficial to the refining industry when same is accomplished and properly enforced, *because it narrows the spread for the resale buyers and we should*

therefore have less resale sugars coming on the market." (Ex. 451-J. 1.) (Italics mine.)

At the directors meeting on May 21, 1931, at which Cummings spoke about the pending suit, the resolution was rescinded. (Ex. 21-26, p. 655.)

The Godchaux letter illuminates the situation, further portrayed by editorial comments in Willett & Gray.[23] Because of the differential, these resales affected defendants' "first-hand" sales adversely. But this, in my judgment, is [fol. 270] no justification for defendants' program which goes much further than their reasonable needs, if their aim were solely the legitimate one of preventing fictitious resales made to conceal secret concessions.

1. Damaged Sugar and Frozen Stocks

The government charges that:

"The Members have agreed to report, and have concertedly reported, the location, amount, exact description, and reason for selling damaged sugars and frozen stocks of sugar, as a condition precedent to selling such sugars at a price lower than the respective Member's reported price. The Members have further agreed to report, and have concertedly reported, each instance of sale of such sugars, the date of sale, the amount sold, the name and location of the

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[23] "There has not been much buying directly from refiners at the 5.20¢ basis as second-hand sugars are obtainable at lower prices." (Willett & Gray, Issue of Jan. 30, 1930.)

"All refiners are now offering at 4.95¢ basis. * * * There has been little demand at this basis as the situation continues unsettled, but any sugars offered below refiners' prices by second-hands are quickly taken." (Issue of Feb. 20, 1930.)

"The refiners sugar situation has continued unchanged, all refiners quoting 4.90¢. There has been little new buying as second-hand sugars are available at from 4.75¢ to 4.80¢". (Issue of April 24, 1930.)

"Refiners continue to quote 4.90¢ but there is no business at this quotation as sugars are available from second-hands at from 4.60¢ to 4.65¢ and any new business received is taken care of by such second-hand sellers." (Issue of May 15, 1930.)

buyer, the selling price, and the character of the damage. The Institute disseminates to all Members such information relating to the proposed and to the completed sales of such sugars. Pursuant to agreements, understandings, and concert of action among the defendants, the Institute is empowered to restrict, limit, and control the sale of such sugars; and in many instances the Institute has restricted, limited, and controlled such sales."

While defendants refer to Exhibit R-7 showing that the volume of deliveries of damaged sugar and frozen stocks, 1928-31, never exceeded one-half of one percent of total deliveries, Cummings testified that "the volume of sales of second-hand sugars and frozen sugars is quite large" (R. 5010.)

Defendants deny either agreeing to report or reporting damaged sugar or frozen stock intended to be sold at a concession as a condition precedent to making such a sale. They admit reporting the price of such completed sales and the issuance by the Institute to its members of a monthly summary thereof. They deny, however, that the [fol. 271] Institute has ever attempted to "restrict, limit, and control" in any way the sale of damaged sugar or frozen stock, or that it has ever been authorized or "empowered" to do so.

Plaintiff refers to considerable evidence inconsistent with defendants' denials.

Since the early months of the Institute, Code Interpretations provide:

"Concessions in prices may be made to move damaged sugars without violation of the provision of the Code that sugar shall be sold only upon open prices and terms publicly announced. In such cases members should give prior notice to the Executive Secretary of the Institute of the location and amount of such sugar with statements as to its condition and the reasons for selling it below the refiner's openly announced price, in order that the Secretary may be prepared to answer complaints that may be made against the member for selling sugar at other than an open price publicly announced."

* * * * * * * * *

"Frozen stocks may be sold at prices under the public price of the refiner without violation of the Code, but only

to clear out consignments not to be replaced. In such cases, as in the case of damaged sugar, notice of the purpose of the refiner should be given to the Executive Secretary to enable him to answer possible complaints of violation by the refiner of the Institute's Code of Ethics." (Code Interpretations, Sec. I, pp. B1, B2.)

As late as February, 1931, Taylor advised Henderson in very definite terms that members were "expected" to observe these Code recommendations. (Ex. 430-S.) There is, moreover, substantial evidence that various refiners so understood the matter. White, American's Sales Manager, testified, however, that this was not American's practice. [fol. 272] In respect to a letter of July, 1930, to a customer from one of American's brokers reading:

"Perhaps you will recall that several weeks ago I stated that the American had a few bags of Fine Granulated in the warehouse which were not in shape to put out to the trade in the regular manner.

"At that time you made an offer of 4.50 for this sugar F O B the warehouse. *I in turn submitted it to the American and they have eventually come through with a letter stating that it was necessary for them to refer the matter to the Institute before they could sell it at less than the market quotation,* and therefore, they are now in a position to receive the offer of 4.50 which they in turn will submit to the Institute for final confirmation" (Ex. 430-0.) (Italics mine.)

White testified:

"I would like to see the advice from the company for the instructions given to this broker. I have no recollection of giving a broker any such instructions." (R. 5296-7.)

But among memoranda which White admittedly prepared to guide himself in conforming to the Code, was one which stated:

"We will be permitted to sell damaged sugars at a reduction in price.

"Before offering this sugar, we will advise the Institute of the amount to be resold and name of the market." (Ex. 385-F.)

In explaining this notation, White testified:

"I have no recollection of ever advising the Sugar Institute or being instructed to advise them before the damaged sugar was sold." (R. 5278.)

[fol. 273] In view of the contrary documentary evidence, I cannot accept White's testimony in this matter as accurate.

Defendants refer to testimony of Taylor that of approximately 2,000 reports received by the Institute of sales of damaged sugar and frozen stock, less than 100 came prior to the actual sales. While failure of the members scrupulously to observe the Institute recommendations may have minimized the effects of the Institute's policy, not only did the recommendations remain in force but the Institute in writing to members urged that the prior notice be given.

Defendants contend that the recommendation is, in any event, entirely reasonable because otherwise the Institute would not be thoroughly informed of the facts and thus would be unable to meet charges from members or others of arbitrary concessions by the refiners. But obviously notification after rather than before the transaction would fully serve this purpose.

Clearly, the notice before sale did enable interference therewith and was sought by the Institute not or not only to meet charges of arbitrary concession but to prevent market disturbances. Thus on December 13, 1928, Worcester, Vice President of Revere, stated at a directors meeting that "It was desirous of closing out at a concession" a stock of sugar in Chicago. The matter was referred to the Executive Secretary". (Ex. 21-26, p. 167.) A few days later, Ballou in writing to the Domestic Sugar Bureau in reference to this matter, said in part:

"It would perhaps be a debatable question whether this comes strictly within the definition of 'frozen stocks not to be replaced' *but I am inclined to give permission to name an open price on this limited stock if you think it would not unduly disturb the market for the members of the Bureau.*

"While my notice does not state specifically that this stock is not to be replaced, I understand that this is the position of Revere. * * *

"Will you kindly give me your opinion as to whether you think the sugar can be thus sold without unduly disturbing market conditions." (Ex. 430-I.) (Italics mine.)

[fol. 274] On another occasion in 1929, American had shipped sugars through a clerical mistake to a point where it had no ready sale. Abbott, then president of American, wrote Ballou:

"We can sell it at the market, in Wheeling, but may perhaps have to parcel it out, or make delivery at customer's place of business, in order to dispose of it, as Wheeling is not a consignment point.

"We should like permission to make the best disposition we can of it at the present market price in the City of Wheeling. If you do not feel that you can pass on this, would you mind holding it for the next Enforcement Committee meeting?" (Ex. 430-M.)

Ballou replied:

"Upon proper showing I have always authorized a businesslike settlement of situations resulting from clerical and other bona fide errors. I do not think it necessary to refer this case to the Enforcement Committee for decision. * * *

"Under the circumstances detailed in your correspondence I should advise and authorize the selling of the balance to the Anderson Caramel Company at Wheeling, to be delivered some time within the next two weeks. * * *

"If this offer of the Anderson Caramel Company is no longer open, *I should like to be advised of any other proposed distribution. The main thing to avoid is a promiscuous offering of the sugar on the open market.*" (Ex. 430-N.) (Italics mine.)

In April 1929, Ballou, on receiving reports of damaged sugar sold by Federal from its New York warehouse, wrote:

[fol. 275] "We have your various reports of this date detailing sugars sold at concessions in * * * Bush Terminal, New York.

"We look with general disapproval upon the idea of disposing of damaged sugars in New York, or other refining

points, and we would view with alarm any general practice upon the part of refiners to sell such large quantities as you report at such a substantial concession in these markets.

"*The question of permission to dispose of warehouse set sugars in substantial quantities at refining points has been consistently discouraged by the Institute,* and other means of meeting the problem have been found. We believe that the best interest of all concerned have been been served by such action.

"We would appreciate your assurances that you will endeavor to avoid such practice in the future." (Ex. 430-D.) (Italics mine.)

In my judgment the Institute's efforts to prevent market disturbances were entirely without legal justification.

In two other respects, defendants restrained sales of damaged sugar and frozen stocks:

In January, 1931, a resolution was adopted by the Directors that:

"The application of frozen stocks or damaged sugars on contracts not calling for such sugars affords an opportunity for discrimination and unfair practice * * *

"It is recommended that frozen stocks * * * and damaged sugar be not applied to any contract not originally calling for them." (Ex. 21-26, p. 613.)

Defendants' explanation is that the condemned application (1) involves the repricing of a contract and thus conflicts with the principle of open price; (2) it opens the door to discriminatory practices in that refiners might apply such sugars at a lower price to the contract of a favored [fol. 276] customer on a later market decline, a course that the customer would prefer. Methods for continuing the prohibited practices without unfair discrimination, which individual refiners might have devised, were thus condemned in advance.

At one Executive Committee meeting, it was the concensus of opinion that damaged sugar or frozen stock should not be sold except in spot transactions. (Ex. 21-26, p. 215.) Place spoke of this as an "Institute regulation". (Ex. 430-G.) Defendants explain this concensus of opinion as simply expressive of the traditional practice; that, how-

ever, does not justify the Institute's efforts to maintain the practice, the obvious purpose and effect of such clearance of opinion.

X

Alleged Agreement on Basis Prices and General Effect of Institute on Price Levels.

Plaintiff contends in effect that defendants have concertedly fixed prices not merely indirectly by the regulation of trade practices that affect prices but also directly by adopting from time to time a basis price and maintaining it during the period that they concertedly desire it to be in effect. Virtually conceding on the oral argument (Tr. p. 769) that there was little direct evidence of basis price agreement, counsel seek to draw an inference thereof from several documents coming from the files of some of the defendants, especially Exs. 442-R and S, 449, 452-W-2 and 463. In my judgment, these lend no substantial support to the charge. They show at most, (1) that after one price change, the reasons therefor were discussed in a correspondence between Ballou and C. & H. in which Ballou criticized C. & H. for reducing its price merely because of a suspicion of secret cuts by competitors and C. & H.'s president in reply, charged Eastern refiners with having attempted to advance the price despite a weak raw market (Exs. 442-R and S, 463; see, too, Ex. O-3, price change of May 9-10, 1929); (2) that at one meeting "refiners generally" may have expressed the opinion that "market * * * will improve next fortnight" (Ex. 452-W-2); (3) that Ballou, in writing Hershey shortly after the Institute was formed, said: "Re-
[fol. 277] finers usually follow price changes, either in whole or in part"; the context of the letter neutralized, however, any inference that Ballou was urging Hershey to do likewise (Ex. 449.)

Officials of the Institute and leading representatives of many refiners definitely and unequivocally denied any concerted action on basis prices. The Institute's office manager who had attended nearly all meetings since 1929, after emphatically denying any discussion of prices or price changes at any of those meetings, added—

"I have heard a discussion begin and work around where somebody might have conceived it to be a price change dis-

cussion, or prices, I should say, and invariably one or two or three or more refiners have gotten up and said, 'This is not a proper subject for discussion and we won't stay if this type of discussion continues'." (R. 5194-95.) See, too, cross-examination. (R. 5195-97.)

A number of witnesses were those who determined the price policy for their respective refineries; each testified that he had acted entirely independently of the Institute and of his competitors in such matters.

In corroboration, defendants have analyzed in some detail practically all price changes during 1928-1931, inclusive, (Ex. 0-3, with more complete analyses of certain of the changes, Ex. N-3). The analyses show that frequently an announcement by one refiner of an advance, would result in a series of announcements by others, ultimately leading to a decline; often, too, the advance would be withdrawn because one refiner would refrain from following the announcement. Except in a few instances, a decline announcement was followed by all.

Plaintiff, while not denying that defendants' sugars are in fact thoroughly standardized, contends that through advertising and other means, a preference has at times been created for one brand or another and that therefore the several brands are not, from an economic standpoint, standardized; for this reason and if free competition prevailed, it urges, the difference in the strength of the preference for the several brands would be reflected in price differences and the price uniformity which has in fact prevailed, would [fol. 278] be lacking. The evidence shows, however, that this preference was generally not sufficiently strong either before or after the Institute to enable one refiner to obtain a higher price for his product than another, except insofar as the other might be giving a lower price by secret concessions. Lowry testified:

"The purpose of advertising is to bring down sales resistance and these two brands [the widely advertised American Domino and National Jack Frost] are very well known and it is natural to suppose that with many consumers they are more acceptable than other brands. But sugar is very standard in quality and it has been rather difficult to get the consumer to call consistently for any particular brand of sugar."

He added, however,

"There is no doubt in certain sections that this brand or the other brand has the call." (R. 412.)

But, at best, the testimony of Lowry and of plaintiff's other witnesses shows only that there were certain exceptional cases or occasionally certain localities in which such a preference was strong enough to command a higher price for a particular brand in sales from a dealer to his trade. In sales by refiners to manufacturers of products containing sugar, which account for about one-third of the sugar consumed, price not brand is always the vital consideration. Plaintiff's and defendants' witnesses agree that one refiner could not ordinarily by virtue of preference for his brand, obtain a higher price than another in selling to his trade. One of plaintiff's witnesses, a buyer for a large wholesale grocery concern which merchandized an average of 175,000 bags of sugar annually, testified that as between the several defendants' sugars, "any inducement, even of a cent or two [per 100 lb.] would take the business, as far as I know." (R. 790.) The evidence shows that defendants' product is in all respects a standardized product; uniformity of basis price in any given area is therefore to be expected under a regime of free competition, Cement Mfrs. Ass'n v. U. S. 268 U. S. 588, 605-6 (1925).

[fol. 279] Prior to the Institute, it is true, Arbuckle and Federal frequently sold openly below the announced prices of the other refiners. But as to Federal, this was because of its reputation for inferior quality, lack of a full assortment of grades and packages, and, because of limited production, with consequent inability to assure filling of orders. As Federal sometime after the Institute improved its methods, it sold on the same basis as its competitors. Arbuckle, which never gave secret concessions, sought in pre-Institute days to meet its competitors' underhand methods by "bargain days"; that is, it would decline its price for a day only. When, as happened at times, other refiners did not directly meet the decline, some would equalize conditions for favored customers by secret concessions. Since the Institute, Arbuckle's bargain day prices have been openly met by other refiners; indeed, they have sometimes led to announcements by other refiners of a general decline not limited to a single day. It is thus apparent that these

pre-Institute instances of lack of price uniformity were of an exceptional nature and do not lessen the strength of defendants' contention that uniformity in price is not necessarily evidence of illegal restraint. Willett & Gray's pre-Institute published prices of the several refiners were not uniform; but, as already explained, these were merely nominal quotations.

Plaintiff refers to another post-Institute change in the price situation. Price variations in different trade areas throughout the country, frequent before the Institute, have been less marked since that time. Defendants, however, point out that though each refiner does not sell in all parts of the country, a considerable overlapping of sales territories has a tendency to cause a decline announcement by one to be followed by all, but an advance to be withdrawn if any one refiner fails to follow it. Obviously the spread of a decline might be retarded by the Institute secret concessions; but, as these no longer prevail, the tendency now is for prices throughout the country to be depressed to the lowest price anywhere prevailing. Of course, this does not mean that post-Institute sugar prices have been lower than pre-Institute; indeed, they have been relatively higher. It does tend to show, however, that the elimination of territorial differences in basis prices is not due to direct agreement.

[fol. 280] Plaintiff also urges as evidence of wrongful restraint of trade, the fact that the number of price changes for refined as compared to raw sugar has been relatively less since the Institute than before. The relation of refined to raw changes, as computed by plaintiff, was successively from 1924 to 1930, 41.74%, 37.37%, 49.41%, 38.29%, 28.71%, 23.08%, and 20%. As cost of raw is the most important factor in the price of refined, the reasonable inference from these figures, plaintiff asserts, is that the post-Institute price of refined has been artificially maintained. As further proof, it adduces the testimony of refined sugar buyers that since the Institute, notwithstanding the fact that the cost of raws constitutes about 80% of refined cost, they were no longer able to anticipate changes in the refined market from raw market trends, because refined price changes have not responded as closely as before to changes in raw. Defendants' explanation is (1) that the price of raw has declined so greatly in recent years that fluctuations therein are too small to translate themselves into immediate

changes in the price of refined. (Fact Brief, p. 448-9.) (2) that this impression of the unresponsiveness of refined prices to raws is due to the fact that because of the allowance of a definite period of grace on each price move for purchases at the old price, these purchasers no longer needed to watch the raw market as closely as before. (Fact Brief, p. 56.)

In my judgment, however, the explanations do not remove the suspicion of price fixing. The post-Institute decrease in the percentage of refined to raw price changes, despite a pre-Institute tendency in this direction, is too marked to be explained by the drop in raw prices; thus, in 1925, 1926 and 1927, when the average price of raws per pound, according to defendants' figures, was 4.431, 4.263, and 4.778 cents respectively, the relation of refined to raw price changes was 37.37%, 49.41% and 38.29%; in 1928, when the average cost of raws was 4.278, it was 28.71%. (See defendants' Fact Brief, p. 454, Government's Memo. in Reply to Defendants' statistical memo., p. 14.) The witnesses who testified to the lack of sensitivity in refined prices to raw were expert sugar buyers who, regardless of whether they could be certain of a definite period of grace on each move, naturally studied market conditions carefully in order to determine the opportune time for buying.

[fol. 281] Defendants have analyzed in considerable detail, statistics relating to profts and margin [24] during the pre- and post-Institute period, to show that there has been no such increase as to warrant an inference of concerted action unreasonably to restrain competition. It would, I believe, serve no useful purpose to review at length the evidence and the arguments as to these matters; it suffices to point out that the post- compared with the pre-Institute period shows a marked increase in margin and a substantial increase in profits despite a concededly large excess capacity.[25] This would naturally follow maintenance of

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[24] The margin is the difference between cost of raw to defendants and prices at which they sell the refined.

[25] Over capacity, it is urged, is necessary because close to the maximum is used during the rush periods by most refiners. This argument, however, has little merit in view of defendants' admission in their answer that the industry

refined price with concurrent raw declines and the evidence shows that prices for refined as compared with raws have been maintained at levels which tend to negate the prevalence of free competition and to support the inference of concerted action, with the effect, normally in these circumstances to be anticipated, of the rise in margins and profits. [fol. 282] The Government argues that defendants' financial statements do not represent their real condition, in that among other things they are overcapitalized, have excess capacity and obsolescent plants; the accounting methods of some of them, too, are subjected to criticism. These matters, however, I pass, because, as the Government contends, it is unnecessary to inquire whether or not defendants made excessive profits except insofar as these would tend to indicate concerted restraint. What is condemned, of course, is not profits large or small, but the shackling of the forces of fair competition whatever the financial result.

Factors which may account in part for the post-Institute price levels, are:

First, the collection and dissemination among the refiners of the statistical information which tends at least to stabilize conditions in the industry, Cf. Maple Flooring Ass'n v. U. S., 268 U. S. 563, 582 (1925), and withholding it in large part from the purchasing trade; this aids the individual sellers in their effort to maintain high prices.

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suffered from 50% over capacity and of their insistence therein that this over capacity was a cause of the undesirable sales conditions prevailing prior to the Institute. Defendant refiners annual capacity, 1927, 17,571 million pounds of raw; annual capacity 1931, 16,665 million pounds. The reduction is accounted for by the elimination of Spreckels in 1930; its capacity was 1,200 million pounds. Since 1927, Imperial, Western and National have slightly increased their capacity. Between 1927 and 1931, notwithstanding elimination of Spreckels, the percentage of defendants' annual melt to capacity has increased from 61.67% to 56.01%. (Ex. W-14.) They have lost much business to the offshore refiners; and at least a substantial part of this business has been lost because the offshore interests, despite cooperation with the Institute, did at times give terms denied by defendants, such as long term contracts.

Second, the steps taken by the defendants to maintain the uniformity of price structure, that is, not uniformity in the basis prices at any given time but in the prices and contract terms at which the several participants in the distribution process obtain their sugar See note 8, supra. The uniformity of price structure was maintained by specific restraints on numerous competitive practices. Thus they restrained long term contracts; if these were made at a fixed concession, as the Revere-Edgar contract was, the purchasing distributor would get his sugar at a lower price than his competitor who could not or did not avail himself of such a contract; a similar advantage could be created through quantity discounts, tolling contracts, combination of distribution functions, use of cheap differential route transportation, purchase of damaged or frozen stock sugar and the like. By imposing substantial restraints thereon, defendants sought to eliminate the possibilities of price variations to distributors or ultimate purchasers at any given time with the opportunity by underselling to disturb the price structure; refiners were thereby relieved, too, of the pressure to reduce prices that would otherwise have been exerted upon them by those who could not or did not get the lower prices or better terms, as has been indicated in the detailed discussion of these restraints. Such relief, too, would tend to aid the individual refiners in maintaining a higher price level.

[fol. 283] Third, the stabilizing effects of the friendly cooperative spirit[26] which the Institute brought to the industry (cf. Ex. 463).

Fourth, the assurance which the open price system under the Institute gave to each refiner that the only prices and terms he need to meet were those openly announced in advance of sales by his competitors. Prior to the Institute, the refiners were able to keep only roughly informed of one another's prices because of the widespread but carefully concealed concessions. Price declines in those days might

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[26] Cummings testified that just prior to the Institute, Many of the refiners were not on speaking terms with each other; there was the utmost bitterness in the industry." (R. 4727.)

sometimes have resulted merely from an unfounded belief that other refiners had made secret cuts. Since the Institute, on the other hand, the opposite tendency has prevailed. Each refiner is encouraged to maintain or raise prices by the assurance that until public notice is given his competitors will not lower their announced prices; and even if they believed that market conditions warranted a decline, the tendency would be to defer it until the "traffic would no longer bear" the then prevailing price. The letter of C. & H.'s president to the Institute (written in June 1929), hereinabove referred to is illustrative. While C. & H. did there lower the price, it charged that the eastern refiners were attempting "to get the trade to load up on a very weak raw market * * * which the trade has resentfully protested against times innumerable." (Ex. 442-S, p. 7.)

In my judgment, these factors are largely responsible for the stability of prices and the maintenance of price levels, regardless of supply and demand, observable since the Institute.

[fol. 284] There is no substantial direct evidence that defendants by agreement fixed or maintained basis prices in the sense of agreeing from time to time to maintain, lower, or raise the current basis price. Any such agreement, express or implied, was strenuously denied. The fact that from time to time, one refiner would maintain or lower the price after another's advance thereby causing the latter to be withdrawn, tends to confirm this testimony. Indeed, a direct basis price agreement was not vital to defendants' purpose; in part at least they were able to maintain prices through preserving the price structure, withholding statistics from the trade and effectuating the open price scheme.

In the light of the entire evidence, I think it clear that while defendants' common purpose was concertedly to maintain relatively high price levels, no agreement to fix basis prices directly, may be reasonably inferred.

[fol. 285] XI. Miscellaneous Activities

1. Fines and "Trials".

(a) Plaintiff charges that defendants agreed to a system of fines to be imposed upon members for violations of the Code. While a resolution to that effect was adopted

by the directors in June, 1930, pursuant to the recommendation passed at a Members' meeting (Ex. 21-26, pp. 445-449), no fine seems ever to have been imposed and in six months the resolution was formally rescinded (Ex. 21-26, p. 618). Defendants contend and plaintiff denies that because the vote was not unanimous the original provision for fines never in fact became effective and that the repeal was merely formal, to clear the record.

When C. & H.'s withdrawal of consent, based clearly on a belief in its illegality was reported to a directors meeting on July 24th, it was expressly excepted from the operation of the fines provisions. (Ex. 21-26, p. 486.) Various members sent out notices to their brokers that the members were subject to fines, and one such announcement was given further currency by the Institute in a circular as late as July 14, 1930. (Ex. 402.) Defendants' actions, the announcements to the trade despite Colonial's protest, and the express exception of C. & H., indicate that the fines provision was deemed operative; plaintiff refers as well to other evidence of like import.

On the other hand, there does appear to have been confusion among defendants as to whether or not the provision ever became operative. Thus, Revere's sales manager in a letter to Taylor, December 8th, 1930, said of it:

"It is my understanding that this section has never been made operative. Am I correct?" (Ex. 403.)

On December 10th he was advised that it was operative. (See Ex. 403A.) But Worcester, v-president of Revere, testified that his company did not "believe" the advice of the Institute that the provision was operative (R. 5582), and several other defendants testified that the provision never went into effect.

[fol. 286] In view of the genuine confusion prevailing among the members as well as the fact that there was evidently never any attempt to impose a fine despite code violations during the period June, 1930-January, 1931, I must deem defendants' abortive attempt to devise a system of fines as of no importance.

Plaintiff, however, contends that despite the repeal of this provision, fines may still be imposed under Institute rules. In support, it refers to the provision in the General Rules of Procedure for the Executive Committee, that:

"The Executive Committee be and it hereby is given authority to levy assessments for Institute operating expenses from time to time as needed." (Ex. 21-26, pp. 658-59.)

It is entirely clear, however, that this relates solely to levies for operating expenses and not to fines.

There is evidence that in the fall of 1930, some steps were taken to devise a plan for penalizing members at the rate of 10¢ per undelivered bag for failure to compel buyers to take delivery within the contract period. But no such plan appears to have been formulated.

(b) A further charge of illegal conduct is that the Institute from time to time examined the several refiners' records, files, etc. in investigating suspected code violations and that more or less formal trials of refiners were held in order to determine whether there had been code violations. These activities, insofar as they were in aid of defendants' other illegal activities, must be held likewise illegal.

2. Allocation of Production and Territory.

While plaintiff seeks to show that defendants attempted to allocate production and territory, it does not charge an understanding to adopt a comprehensive scheme for such allocation. The evidence shows at most only that (a) defendants considered allocation of production and collected and exchanged statistics serviceable as a basis therefor; (b) other activities resulted incidentally in limiting sales terri- [fol. 287] tories of some defendants in certain isolated instances; there may, too, have been some concerted effort in one case, to induce Western to withdraw from Indiana, Ohio, Kentucky and Tennessee. These matters will be dealt with briefly.

(a) At the Institute organization meetings, the question of allocating production was discussed. Defendants were advised by counsel at that time that this was an improper subject for concerted action. A representative group of officials of various refiners testified that the matter was thereupon dropped and never again discussed or considered.

Soon after the Institute was formed, statistics of production of the several refiners for 1925, 1926 and 1927 were

collected, as "background statistics for comparative purposes", according to defendants. (R. 8643.) Members also made current weekly reports of production and each in return received from the Institute a report showing the percentage of his production for the week and for the year to date. (Ex. 1-2.) Fisher, Institute's office manager, admitted on cross-examination that the members had all of the necessary figures if they had wanted to allocate production. R. 8683.

Defendants offered data indicating that no allocation had in fact been effected, and there is no substantial evidence that it was even attempted. The Government relies on a letter from Arbuckle to the Institute, in which reference is made to "results of the years 1925, 1926 and 1927, reported to the Institute to serve as a basis for allotment." (Ex. 460.) The letter was written in January 1931, long after the figures were reported. At best, it is but slight evidence that such was the purpose of the report. Defendants urge that the writer evidently confused statistics discussed at pre-Institute meetings before advice of counsel that allocation was improper, with those subsequently reported for "background" purposes. I am inclined to accept this explanation especially in view of the testimony of defendants' witnesses that the matter was never dealt with subsequent to that advice. The context of the Arbuckle letter lends some support thereto, for immediately following the above quoted excerpt, it proceeds:

[fol. 288] "Then came the feeling that allotments were not in order and no good came of making our reports for the three years indicated."

Defendants' analyses of production figures show so clearly that no allocation was effected that I deem it unnecessary to discuss them in detail, especially since plaintiff has offered neither evidence nor argument to the contrary. Exhibits upon which defendants rely in this respect are W-14 to Z-14, A-15, B-15. They reveal wide variations from year to year in the production of the several refiners. One of them, Y-14, showing each refiners' percentage of the total melt for the years 1925 to 1931, was referred to in the testimony of one of the defendants' economic experts; he stated:

"I see no evidence of freezing or conditions of relative shares of the various refiners measured by these figures for the melt. The percentages vary normally, it seems to me, and as between the period 1925 and 1927, compared with 1928 as against 1931, there seems to be rather more variation in the latter period than in the former period." (R. 10484-5.)

(b) There is no evidence that defendants gave any consideration to a general territorial allocation. Plaintiff points out however, that incidental to the application of Code 3 (c) and agreements with respect to "arrival" terms, McCahan may have lost ground in the Chicago and adjacent territories, that application of Code 3 (c) may have similarly affected Savannah with respect to some territories and that during the months when Code 3 (c) was a live issue, some refiners made suggestions with respect to the territories in which others ought to operate. Plaintiff complains, too, that Lamborn may have had to withdraw from North Carolina because of agreeing to charges on l.c.l. shipments out of Norfolk. Hershey may have suffered territorially because of the elimination of Wilmington as a storage point. But all of these alleged "restraints" were merely incidental to defendants' other wrongful activities heretofore considered and will doubtless end with their cessation.

[fol. 289] Plaintiff also seeks to show that Western was persuaded to withdraw from competition in Indiana, Ohio, Kentucky and Tennessee through efforts of other refiners. Some of the defendants' telegrams and letters support this charge. But there is, too, evidence that Western withdrew because its venture in this section was unsuccessful. In any event, the matter does not appear to have been important. It occurred during the first year of the Institute and there is no evidence showing similar incidents thereafter. Moreover, statistical analyses offered by defendants, as well as testimony of an economic expert in reference to one of them strongly support defendants' contention that there has been no allocation of territory. (See Exs. J-15, F-15, R. 10490-91.)

In such circumstances, plaintiff has shown no substantial basis for a fear that defendants are likely to concern themselves with such matters. I shall therefore deny relief with respect thereto.

3. Blacklisting of Customers.

Plaintiff charges an agreement among defendants, (1) to report to the Institute names of those who were stricken from refiners' list of customers because they cancelled or repudiated any part of their contracts; (2) to refuse credit to a customer who for that reason had been stricken from the list of another refiner.

The Institute recommended, in a code interpretation,

"that the failure of the buyer to complete his contract according to its legal effect, be deemed sufficient reason for the suspension of credit terms." (Sec. I, p. D5.)

Plaintiff apparently does not contend that it would be improper for the Institute to recommend withdrawal of credit in such circumstances. There is evidence indicating that refiners did not deem themselves bound by this recommendation but exercised their own individual discretion in determining whether or not credit should be withdrawn. It does contend, however, that it would be improper concertedly to "blacklist" customers stricken from the list of any one refiner because of cancellation or repudiation of contracts. Defendants, admitting that such customers [fol. 290] were supported to be reported to the Institute, and that their names, but not that of the refiner reporting them, were circulated, insist, however, that there was no understanding for a concerted black list and that the circulation of the names was intended merely as credit information and was in fact only so used.

Plaintiff urges that "If the refiners had actually been interested in credit information, their plan would have provided for the reporting of cancellations and repudiations by the customer, whether or not the refiner reporting the information had stricken the customer's name from his list. If, on the other hand, the object was to blacklist any customer who had been stricken from one refiner's list then we would expect the defendants to have acted precisely as they did." (Government Brief p. 449.)

The strongest cited evidence of a blacklisting arrangement is a Revere letter to the Institute, dated February 18, 1931, (Ex. I-6), and a series of documents from McCahan's files (Exs. 414-414 P). Material parts of the former follow:

"Last summer one of our competitors placed a customer in breach due to his failure to take delivery of sugars at the expiration of the alloted time.

We have continued business relations with this customer, and have been subject to some criticism by competitors because we have not severed business relations.

I submit to you this customer's contract performance for the last seven contracts, and will be interested to learn if you, and the Executive Committee consider that the record as a whole shows evidence of bad faith, either on our part, or on the part of the customer. In other words, do you feel that we, in this particular instance, are properly the subject of just criticism."

[fol. 291] While this letter shows that refiners may have hoped that reported customers would be cut off the lists of their competitors and may have criticized the failure to do so, it not only falls far short of establishing, but on the contrary, it tends to negate an agreement in this respect.

The McCahan documents, principally inter-office communications, tend to show (1) that it was the understanding of Place, its Vice-President, that a customer reported as stricken from the list of one refiner should not "be sold by other refiners—at least not without discussing the subject openly"; (2) that Abbott (general counsel and later president of American), Hoodless (Vice-President of Pennsylvania) and others had a similar understanding (Ex. 414E.) Place's explanation of these documents, that he was misrepresenting the true facts in order to induce his subordinates to feel bound to cease selling a particular customer whom Place personally wished to cut off, cannot be accepted.

However, responsible officials of a number of refiners testified that the lists of reported customers did not affect their sales policy. Moreover, defendants have introduced the sales records of a number of the refiners; in all nearly 150 customers were reported during the period covered. Defendants' unchallenged compilation thereof with respect to the refiners whose records were produced, shows that despite the Institute reports, American continued to sell 62% of its customers reported by other refiners, National 81½%, Arbuckle 89%, Revere 80%, and Pennsylvania 74%.

I therefore deem the McCahan documents insufficient to establish an understanding on the part of defendants gen-

erally to blacklist reported customers. That may have been Place's understanding and his belief as to the others. But this evidence is too inconclusive, especially in view of the countervailing evidence, to establish an agreement in this respect.

Plaintiff's argument that defendants' report of such customers only as had been stricken from refiners' lists indicates a blacklisting scheme, is unconvincing. Defendants explain that such names alone were reported in order to simplify the refiners' reports to the Institute and to provide information as to those customers whom refiners [fol. 292] deemed the most serious offenders against contract terms. In my judgment, such information would be legitimately of greater interest in determining credit policy than a report of all customers who had repudiated or cancelled contracts.

XII. Raw Sugar Polarization Allowances

Petitioner charges that defendants acted illegally in that they "agreed upon • • • uniform and arbitrary differentials for raw cane sugars purchased for their respective refineries, said price differentials to be based upon the quality of the raw cane sugar indicated by polarization tests, and agreed to restrict their allowances on high quality raw cane sugar."

The evidence establishes the following facts: (I paraphrase to a large extent the statements in defendants' brief). The sucrose content of raw sugar expressed in terms of sugar degrees is determined by a polariscopic test. Raw sugar is bought and sold on a 96° basis; that is, the specified contract price is for 96° raw sugar. If the polariscopic test, made after delivery of sugar to the refiner, discloses that the sugar tests higher than 96°, the refiner pays the producer an allowance over the basis price, because of the additional sucrose content; if the sugar tests below 96°, the refiner is entitled to an allowance.

Because the sucrose content of any given lot is not determined until the test, there must be some scale of allowances accepted by both parties, upon the basis of which adjustments in the contract price may be made. This cannot practicably be negotiated for each contract; there must be therefore some generally accepted sale of allowances. This was customarily fixed from time to time by negotiations at meetings of producers and refiners. Thus the scale

so adopted in 1916 provided for 1/32 of a cent per pound additional for each degree above 96° to and including 98°, and 1/16 of a cent deduction for each degree below 96°. The deduction per degree was greater than the addition because as refinery equipment is geared to handle 96° sugar, the refiners' benefit if sugar tests above 96° is proportionately less than the detriment if it tests below 96°. [fol. 293] No additional allowance was provided for raw sugar testing above 98° because there is practically no such sugar.

This scale of allowances was defective in that it did not provide adjustment for variations in the basis price of raw sugar. When this rose materially, the allowance of 1/32 of a cent was inadequate from the producers' standpoint and the deduction of 1/16 of a cent inadequate from the refiners' standpoint. Conversely, when it fell materially, the refiners were paying an excessive premium while the producers suffered unduly, for sugar testing respectively above or below 96°.

Marked variation in the basis price of raws necessitated working out a new scale based on the then prevailing price. In 1919, an attempt was made to eliminate the necessity for repeated revisions, by providing for fluctuations in the price of raw sugar. Different scales were prepared expressing the allowances applicable when the basis price was 6¢, 7¢, 8¢, etc. But this schedule failed to take into account anything less than full cent fluctuations; the same scale applied whether the price was 6¢, or 6.99¢ while a different scale was used when the price advanced only 1/100 of a cent to 7¢. The scale was also defective in other respects. As a result the refiners in 1927, were paying an excessive premium on sugar testing above 96°, while the producers were suffering unduly on sugars testing below 96°.

In January, 1928, the President of National invited the several refiners and a group of raw sugar producers and brokers, representing, as defendants' emphasize 95% of the raw sugar producing interests operating in the New York market, to a readjustment conference. There, National's technical expert suggested a scale expressed in terms of a percentage of the basis price rather than in fractions of a cent, as more scientific and accurate and operating equally fairly to both sides. The suggestion was

approved; committees were selected representing each side to work out an acceptable scale. After negotiations between them, conducted so far as the record shows in entire fairness, had begun, the informal committee of refiners was formally reappointed by the then newly formed Sugar Institute. A compromise agreement, accepted by the two [fol. 294] committees in February, 1928, was reported to the Institute; it issued a circular recommending March 12, 1928, as the effective date for the new scale. Because of protests from raw interests, the Institute acquiesced in a suggested postponement to May and issued a second circular to the trade announcing the later effective date.

No suggestion was ever made that the new scale was unfair to the raw producers. Their complaint that large interests were without representation in the "deliberations", evidently referred not to deliberations resulting in the new scale as such but to those at which the effective date thereof was determined. The new date appears to have been entirely satisfactory to both interests.

The government complaint is that (1) allowances to sellers of raws for sugar testing above 96° were scaled down (2) they were not adequately represented in the negotiations and (3) the differentials finally determined upon were reached by agreement. The evidence affirmatively shows that the scale of allowances prevailing prior to the 1928, agreement, for sugar above 96° was unfairly high, that the new arrangement was scientific and entirely fair, that any lack of representation was due to inadvertence and in any event was unimportant, that scales of allowances similarly negotiated and agreed to were customary and practically necessary.

In my judgment, undue restraint of trade in these respects is not proven. The special circumstances justify the action taken. Cf. Chicago Board of Trade v. U. S., 246 U. S. 403 (1923); National Ass'n of Window Glass Mfrs. v. U. S., 263 U. S. 403 (1923).

[fol. 295] Legal Consequences of Defendants' Actions

1. That the Anti-Trust laws allow competitors a broad field for concerted action in eliminating frauds (Cement Mfrs. Assn. 268 U. S. 588 (1925)) and "destructive" practices (Appalachian Coals, Inc. v. U. S., 288 U. S. 344 (1933)), that widespread dissemination of trade statistics

is to be encouraged in aid of sound competition (Maple Flooring Ass'n v. U. S., 268 U. S. 563 (1925)), and that in any event a restraint of trade is not illegal unless undue or unreasonable are too well settled to require discussion. (Appalachian case, p. 360-1; U. S. v. Trenton Potteries, 273 U. S. 392, 396 (1927).) But whether or not a restraint is undue or unreasonable depends, of course, upon all of the facts in the particular case and the effect of that restraint in the specific industry (Appalachian case, supra; Maple Flooring case, at p. 579).

In this case, it must be determined whether any or all of the restraints of trade went only so far as was necessary to avert unsound and illegal practices or whether the measures adopted went in whole or in part beyond what was essential or proper for this purpose and in their application, seriously affected sound competition. In this connection, the variance between defendants' expressed aims and their real objectives as heretofore pointed out, is of importance. While proper and wholesome restraint does not become illegal merely by reason of concealed or pretended motives (Board of Trade case, 246 U. S. at 238) this may well turn the scale against legality as to those practices the validity of which might otherwise be doubtful.

I take up at the outset one of defendants' principle arguments in justification of the legality of their acts. They contend that the pre-Institute secret concession practices resulted in a discrimination which violated both the letter (George Van Camp & Sons Co. v. American Can Co., 278 U. S. 245 (1929), American Can Co. v. Ladoga Can Co., 44 Fed. (2d) 763 (C. C. A. 7th, 1930) and the spirit of [fol. 296] Section 2 of the Clayton Act;[27] that for this

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[27] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities * * * where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimi-

reason they properly and legally sought concertedly to eliminate these practices. As illustrative of the practices involved, the prohibition of quantity discounts may be cited. As to that, defendants say that though the proviso in Section 2 expressly sanctions the granting of discounts based on quantity sales, nevertheless in the sugar industry, such a practice would contravene at least the spirit of the Clayton Act. They assign as the reason therefor, that large sugar sales to a single customer produce no greater economies to the refiner than the equivalent quantity sold to a number of customers. The discussion of the facts, however, has demonstrated what defendants must have known, that economies in many, if not in most cases, had resulted and would result from quantity sales and that therefore a discount based thereon is, at least, not necessarily unfairly discriminatory in its operation. Furthermore, even if in some instances, as at times at least in sales to chain stores, a restraint on the grant of a discount based solely on the quantity bought would be justifiable, a general prohibition of such discounts goes so clearly beyond the proper or necessary remedy for any possible evils as to demonstrate the falsity of defendants' alleged motives and to make their action clearly an unreasonable restraint of trade.

[fol. 297] Further illustrative is the prohibition against brokers, warehousemen and sugar buyers uniting their several functions, also the restraint on tolling contracts. It is entirely clear that whatever discrimination might arise because some could and others could not take advantage of these opportunities, would be due not to any grant of an arbitrary concession or to any unfair discrimination practiced by the refiner but to the relative economic condition of the two classes. Examples might readily be multiplied.

A discrimination in and of itself is, of course, not necessarily unfair or illegal, as is implicit in the Act itself. Cf.

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nation in price in the same or different communities made in good faith to meet competition: And, provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade." (U. S. C., Title 15, Sec. 13.)

Baran v. Goodyear Tire & Rubber Co., 256 Fed. 570 (S. D. N. Y., 1918). The important fact is that defendants were not primarily interested in conforming or having others conform either to the letter or to the spirit of Section 2 of the Clayton Act. Indeed, they have themselves created arbitrary "discrimination" as, e. g. in the case of delivered prices, see p. 72 of this opinion. What interested defendants was the preservation of the price structure, the maintenance of relatively high prices and the elimination of burdensome competitive practices and of every possibility of a secret concession grant.

2. The refiners' basic agreement to offer all prices, terms, and changes therein only on an open announcement, effected, contrary to defendants' insistent statement, a change [28] from the purported pre-Institute practice. While representatives of the ethical refiners testified that they had made no such change, even they had deviated to some extent from their former practice. Thus, Revere's pre-Institute long term contract, while offered fairly to all customers in a position to use it, had admittedly not been "open" in the sense of having been publicly announced. (Tr. of Arg., p. 272.) Henderson, too, one of the ethical re- [fol. 298] finers, gave at least two long term contracts, apparently without open announcement.[29] Special terms like the pre-Institute tolling, while apparently granted on a fair basis at least by some refiners, never appear to have been the subject of open public announcement. The used bag allowance granted by Pennsylvania to National Biscuit Co. and the Godchaux-Edgar long term contracts were privately negotiated; indeed, they may each have been so unique as to require special arrangements for them alone. The unethical refiners' selling bases, the prices at which they purported to sell, do not appear always to have been openly and publicly announced in advance of sales; some of them varied these from time to time without formal public announcement.

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[28] This was in addition to the use of the Institute for relaying the information by all except C. & H.

[29] Shortly after the Institute he wrote to Ballou "we will, of course, in the future make no more such contracts." (Ex. 398-A.)

Though defendants contend that the open announcement rule is essential to true economic competition, it has not produced this result. True it is that regardless of the effect of open announcement, special terms were specifically abolished or limited by special agreement; the requirement, however, in all cases, of open announcement in advance of sales, necessarily in and of itself ended any possibility of special terms when private negotiations were essential. The rule in this way afforded a convenient and frequently adopted reason for not offering them; Revere's representative testified that its post-Institute change of policy as to long term contracts was "because we considered that that was not selling on our openly announced prices and terms" (R. 5548). As the discussion of the facts has shown, the assurance to each refiner, implicit in the agreement, that no competitor would vary his prices or terms without advance notice, was even more serious, because it tended in fact, as it naturally would tend, toward maintenance of price levels relatively high as compared with raws.

Defendants contend, too, that open announcement is also essential to prevent wide spread discrimination, fraud and misrepresentation. Obviously unless both buyers and sellers are well informed with respect to market conditions, fraud and misrepresentation are likely to be wide spread. Thus, a buyer, by misrepresenting the price obtainable [fol. 299] from one refiner, may induce a competing refiner, ignorant of the actual situation, to sell at an unreasonably low price; conversely, a seller by similar misrepresentation as to his competitor's prices may be able to exact an unreasonably high price from customers ignorant of the true condition. Naturally, too, the fraud and misrepresentation made possible by ignorance of actual market conditions, may lead to arbitrary discriminations between customers. But such unfair competition could have been remedied without an agreement to sell only on the basis of prices and terms openly and publicly announced in advance of sales. The testimony of defendants' own witnesses indicates that competition among sugar buyers was so keen that when an arbitrary discrimination in favor of one became known, others similarly situated would ordinarily bring pressure to secure like favorable treatment. Either they would have succeeded or the discriminatory

favor would have had to be withdrawn. Immediate publicity given to the prices and terms of all closed transactions, which so far as the record shows, would not have been impracticable, would thus have resulted in preventing the discrimination, fraud and misrepresentations that defendants professed the desire to avert.

It may be that in some circumstances an ideal system would be, as defendants contend that it is, one in which all sales are made on the basis of open public announcement definitely stating all prices and terms. But the facts of this industry demonstrate that the operation of this agreement for open announcements has been to aid both in maintaining price levels without regard to the normal effect of supply and demand and in eliminating ofttimes, entirely fair competition. Defendants' professed aims in adopting and enforcing the plan could moreover, have been achieved by less drastic and less harmful means. Whatever may be its theoretical merits, it has been clearly proven in this case that defendants' concerted plan has here brought about an undue restraint of trade and for that reason is to be condemned.

Exchange and publication of the details of closed transactions, through a trade association (Maple Flooring case, supra), and of prices at which specific job contracts had been entered into (Cement case, supra), have been upheld. But in neither case was legal sanction given to concerted action for announcing or maintaining open prices and terms for current or future transactions.

[fol. 300] In U. S. v. American Linseed Oil Co., 262 U. S. 371, (1923) an agreement to furnish the Bureau with a "schedule of prices and terms and adhere thereto—unless more onerous ones were obtained—until prepared to give immediate notice of departure therefrom for relay by the Bureau to members" was held illegal. This practice was expressly referred to in the Maple Flooring case, 268 U. S. at 581, in distinguishing the Linseed Oil case. While, as defendants point out, the agreement in the instant case differs in its terms from that in the Linseed Oil case in that here it was to adhere to prices and terms until a public announcement of a departure therefrom should have been given, nevertheless, the principle of that case, in my judgment, is presently applicable.

As defendants state in their law brief (p. 204-5) the use of the Institute for relaying announcements "is designed

to put added support behind the policy of selling only at open public prices". As an integral step in what I have found to be an unreasonable restraint of trade, in concertedly enforcing open public price announcements, the use of the Institute for relaying becomes in itself illegal. I find it unnecessary to pass upon the legality of the use of the Institute for relaying open public price announcements in advance of sales, if each refiner entirely independently of the others voluntarily made his own announcements without obligation to adhere thereto.

As to the Three O'clock Notice Rule, were it not tied up with the concerted open public announcement rule, a different question would be presented, on the legality of which I need not pass. (Cf. Board of Trade case, supra.)

The attempt to prevent all repricing was abandoned after the first few months of the Institute. At that time, a code interpretation was adopted, allowing repricing but only as to sugar sold or delivered on the day of the decline. Thereby an undue restraint was placed on repricing of the sugar sold or delivered before that day.

3. Statistical Activities.

(a) By the failure to circulate to customers the material which the Institute collected and circulated to the refiners and which was not otherwise obtainable, sellers, now better informed than purchasers, have clearly acquired an advan- [fol. 301] tage inconsistent with that "perfect" competition which defendants profess to foster and which their economic expert described.

The legal question is therefore presented whether or not the Anti-Trust laws condemn defendants' concerted restriction in the dissemination of such information to their own ranks; in my judgment, they do. In American Column & Lumber Co. v. U. S., 257 U. S. 377 (1921), the Court significantly said (p. 411):

"In the presence of this record it is futile to argue that the purpose of the "Plan" was simply to furnish those engaged in this industry, with widely scattered units, the equivalent of such information as is contained in the newspaper and government publications with respect to the market for commodities sold on boards of trade or stock

exchanges. One distinguishing and sufficient difference is that the published reports go to both seller and buyer, *but these reports go to the seller only.*" (Italics mine.)

In U. S. v. American Linseed Oil Co., 262 U. S. 371 (1923), the second comprehensive trade association case before the Supreme Court, which likewise resulted in a decree for the Government, all information collected was "for the exclusive and confidential use of the subscriber" to the plan (p. 380). In discussing the illegality of defendants' activities, the court said:

"The Sherman Act was intended to secure equality of opportunity * * * (p. 388).

* * * * * * *

"With intimate knowledge of the affairs of other producers * * * the subscribers went forth to deal with widely separated and unorganized customers necessarily ignorant of the true conditions * * * (pp. 389-390).

"* * * the ordinary practice of reporting statistics to collectors stops far short of the practice which defendants adopted * * *" (p. 390).

[fol. 302] In the Maple Flooring case, supra, at p. 581, the Court, in distinguishing the Linseed Oil case, mentioned among other things, the confidential nature of the statistics collected. And in sustaining the legality of the Maple Flooring trade association, the opinion emphasizes the wide publicity given to all pertinent statistics, in these words:

"The statistics gathered by the defendant Association are given wide publicity. They are published in trade journals which are read by from 90 to 95% of the persons who purchase the products of Association members. They are sent to the Department of Commerce which publishes a monthly survey of current business. They are forwarded to the Federal Reserve and other banks and are available to any one at any time desiring to use them." (Pp. 573-4.)

In considering the economic and legal justification for the Association's practices, the Court said:

"It is the consensus of opinion of economists and of many of the most important agencies of Government that

the public interest is served by the gathering and dissemination, *in the widest possible manner*, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. *Free competition means a free and open market among both buyers and sellers* for the sale and distribution of commodities." (Pp. 582-583.) (Italics mine.)

The court concluded (p. 585) that the defendants had done no more than "if like statistics were published in a trade journal or were published by the Department of Commerce, *to which all the gathered statistics are made available.*" (Italics mine.) And finally, in stating the exact limits of the decision, the opinion says:

[fol. 303] "We decide only that trade associations or combinations of persons or corporations which *openly and fairly* gather and disseminate information (as to certain specified matters) * * * do not thereby engage in unlawful restraint of commerce." (P. 586.) (Italics mine.)

It is thus abundantly clear that just as the secrecy in respect to statistics was an element of illegality in the Column & Lumber and Linseed Oil cases, so the publicity given thereto tended to negative illegality in the Maple Flooring case.

Defendants urge the Cement Manufacturers case, supra, decided at the same time and with the same result as the Maple Flooring case, in support of their failure to disseminate the statistics to the trade. They point to no specific language in the Supreme Court opinion; they cite, however, that of the lower court as indicating that the statistics there collected were in fact kept confidential, 294 Fed. 390, 398-9 (S. D. N. Y., 1923). The District Court did discuss evidence of an effort to conceal from the trade information of production and shipments; but, there was likewise evidence that the trade was not interested therein, and that if it had been, the manufacturers would have revealed it. (Supreme Court Record in that case, Vol. 1, p. 338). In any event, the Government, if it had ever pressed the

point, evidently abandoned it on appeal; its brief in the Supreme Court contains no reference to such secrecy. Its discussion of statistics other than those as to prices, related to the contention that data as to production and shipment were collected for use in regulating production and prices. See Government brief in that case, pp. 80-93, 213. The Supreme Court, in determining the legality of the statistical activities, addressed itself solely to this contention. In the closing paragraphs of the opinion, it is said:

"* * * this record wholly fails to establish either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of ce- [fol. 304] ment to which we have referred; and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action.

"*For reasons stated in Maple Flooring Association v. United States, supra*, such activities are not in themselves unlawful restraints upon commerce and are not prohibited by the Sherman Act." (Italics mine.) (Page 606.)

The court, in deciding the Cement case on the basis of "reasons stated" in the Maple Flooring case, could not have meant to hold as legal the omission of those acts, the doing of which were deemed a justification for the Maple Flooring activities; it evidently intended only to reaffirm the principles there developed. Of defendants' discussion of the Cement case, I may say with Judge Learned Hand that "the practice of searching records and extracting as a part of the decision what the court did not mean to hold, may be useful as an academic exercise, but it is otherwise idle." The San Simeon, 63 F. (2d) 798, 802 (C. C. A. 2nd, 1935).

I conclude that pursuant to the Supreme Court decisions respecting the duty of trade associations under the Anti-Trust laws, defendants' failure to make more complete disclosures to the trade of statistics collected and circulated within their own ranks, is in itself an unreasonable restraint of trade.

(b) Plaintiff complains of the failure of the defendants to collect and circulate statistics as to raw sugar prices,

raw stocks and demand for refined sugar. Statistics as to the last of these matters would clearly be helpful to customers. Statistics as to the first two would be of little if any value. The perfect competition contemplated by economists might have been more nearly realized if defendants had gathered and published all of this material, but in the circumstances of this case, their failure to go so far can not be deemed an unreasonable restraint of trade. The position of refiners and their customers before and after the Institute has been unchanged. In failing to collect and disseminate to the trade information thereon through the Institute or otherwise, the refiners neither sought nor obtained any unfair advantage over their customers.

[fol. 305] 4. Concerted dealing with brokers and warehousemen.

Defendants' argument with respect to concerted activities affecting brokers and warehousemen may be summarized thus: (a) because reasonably necessary both to make the principles of the code effective and to prevent frauds upon the refiners, concerted action through what is commonly described as a boycott is legal; (b) the special relations between refiners and brokers or warehousemen are an additional justification of their conduct.

(a) It is unnecessary to discuss at length primary as distinguished from secondary boycott, cf. Duplex Printing Press Co. v. Deering, 254 U. S. 443, 466 (1921) because a concerted refusal to deal with an individual, (and the allegedly illegal conduct here amounts to little more) may be legal if proper justification therefor be proven by the boycotter, U. S. v. American Livestock Co., 279 U. S. 435, 437 (1929). Refusal to deal has been upheld as legal when cooperation with the boycotted party would involve commission of an ultra vires act, U. S. v. American Livestock Co. supra, pp. 437-8. The Supreme Court has sustained the limitation in an injunction decree against a combination of meat packers, etc., that the defendants were not restrained "from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers". Swift & Co. v. U. S., 196 U. S. 375, 394 footnote (1905); see, too, the

Cement Mfrs. Assn. case, supra, at p. 604. But these cases go no further than to establish a general principle that there may be legal justification for concerted refusal to deal, dependent on the facts in any case.

The drastic character of the means here adopted to eliminate actual and supposed evils and possibilities of evils in a business requiring the use of brokers and warehousemen has been sufficiently developed in the discussion of the facts. The resulting hardship to a substantial number of persons and the prevention of the possibilities of a lower price to the ultimate consumers through vertical organization of distribution agencies, have likewise been described.

[fol. 306] Defendants seek to justify their dealings by showing that they were necessary and reasonable to prevent (1) secret concessions (2) discrimination and (3) fraud.

(1) As the foregoing discussion of the facts indicates secret concessions might have been prevented without compelling a choice of but one of the several distribution activities. This may well have been the surest and easiest method of preventing refiners from practicing the type of secret concessions made possible by combination of functions. But as other methods not involving material damage to innocent third persons were readily available, defendants' purpose to end secret concessions is no justification for the action taken.

(2) Another avowed and important aim in prohibiting the combination of functions was to prevent what defendants call the improper discrimination that would result therefrom. But they fail to demonstrate that combination of the several functions in one concern, due to better financial condition or greater business acumen and/or efficiency is unfair, uneconomic or inconsistent with sound competition because it may give a greater opportunity to reduce charges or prices below those of a competitor. While this might perhaps ultimately lead to the elimination of those who cannot or will not effectuate a like combination, the development of a system in which combination of functions is the rule, may on the other hand, well bring about a more economical and efficient distribution of sugar and therefore be desirable.

Defendants' real reason, as already indicated, for opposing the combination of functions is that it tends to prevent uniformity of price structure.

Defendants' argument is fully answered in a series of decisions involving analogous situations. Thus a concerted refusal by jobbers to deal with manufacturers who also sell directly to retailers has been held illegal under the anti-trust laws, Eastern States Retail Lumber Dealers' Association v. U. S., 234 U. S. 600 (1914); Wholesale Grocers Ass'n. v. Fed. Trade Comm., 277 Fed. 657, (C. C. A. 5th, 1922); U. S. v. S. Cal. Wholesale Grocers' Ass'n., 7 F. (2d) 944, (S. D. Cal., 1925); so, too, a combination of manufacturers, jobbers and retailers to boycott agencies in their industry that unite a wholesale and retail business. National Harness Mfrs. Ass'n., v. Fed. Trade Comm., 268 Fed. 705, (C. C. A. 6th, 1920). In the leading case of Eastern States Retail Lumber Dealers Association v. U. S., supra, at 613, the Court said:

[fol. 307] "The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare in providing retail facilities is answered by the fact that Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted."

Defendants seek to distinguish these cases on the ground that they involve condemnation of concerted refusal to deal where its justification is merely "to increase the business advantage of the group or association engaged in the boycott". But the preservation of uniformity in price structure is precisely that; defendants' practice lessens the possibility of developing more economical distribution.

If defendants had demonstrated, as they have not, that in the long run it would be economically wise and conducive to fairer competition, to create or maintain a distribution set-up composed of brokers, warehousemen and merchandisers, each independent of the other, a different situation would be presented; then the "freezing" of a particular set-up might be legally justifiable. Cf. Chamber of Commerce v. Fed. Trade Comm., 13 F. (2d) 673 (C. C. A.

8, 1926). But in the present situation, I deem the cited cases controlling in rejecting defendants' argument that their concerted refusal to permit the unifying of the activities is justified by the desire to eliminate "discrimination."

(3) While it clearly appears that some brokers and warehousemen had been guilty of frauds and unfair dealings and that the combination of distribution functions did and would facilitate such wrongful practices, it is likewise clear that other brokers and warehousemen in substantial numbers, combining the several functions, were entirely honest and zealously guarded the refiners' interest. Only clearly proven necessity could justify action which bore so heavily as did defendants' on entirely innocent parties.
[fol. 308] Defendants have failed to show that less drastic methods not so injurious to innocent third persons, would not have afforded them full protection against frauds. No real effort in that direction was ever made. As the discussion of the evidence shows, there is good reason to believe that the fraudulent and unfair practices would have been effectively checked, had the same energy been devoted to discovering and dealing with them as was given to ending the union of functions. The Cement case presents just such a situation. There, fraud seems to have been effectively dealt with by a trade association without adopting such prohibitive measures.

Defendants' interest in matters other than the legitimate one of eradicating fraudulent and unfair practices largely explains their procedure. In such circumstances, fraudulent conduct of some customers will not justify a concerted refusal to deal, U. S. v. First Nat'l Pictures Inc., 282 U. S. 44 (1930); this case cannot be distinguished on the ground urged by defendants that the concerted action there was designed to go much further than merely to eliminate fraud. There, as here, the fact that one of the purposes was legitimate, effectively to protect against fraud, see opinion of court below, 34 F. (2d) 815, 818 (S. D. N. Y., 1929), could not save the scheme. See, too, Paramount Famous Lasky Corp. v. U. S., 282 U. S. 30 (1930).

(b) I come then to defendants' second major contention on this subject: that "the course of dealing with brokers and warehousemen is legally justified by the special relations in which the refiners stand" to such parties.

The character of these relations has been sufficiently developed in the discussion of the facts. Defendants argue:

"In view of these relations it is obvious that both the broker and the warehouseman are integral links in each refiner's conduct of his business. He can not direct his conduct along the lines which he has elected to follow except through control of the conduct of the brokers and warehousemen in his employ. It is submitted that under these circumstances, if the refiner is permitted as a matter of [fol. 309] law to follow the conduct outlined in the Code, there can be no lawful objection to his taking such steps as are reasonable to provide that this conduct shall not be interfered with by the acts of his brokers and warehousemen. It is submitted that where there is a legitimate concert to accomplish a particular end there may lawfully be a concerted control of persons standing in the relation which brokers and warehousemen occupy towards the refiners in order to insure their cooperation towards the end in question." (Defendants' Law Brief, p. 251.)

It is apparent that the argument is not essentially different from the one already advanced. However, defendants cite two District Court cases from which they seek to draw an applicable inference that the legal consequences of concerted regulation of agents differ from those which follow concerted action directed toward other ends. In one of them, United States v. Hamburgh-American S. S. Line, 216 Fed. 971 (S. D. N. Y., 1914, before Lacombe, Coxe, Ward and Rogers, Circuit Judges), Judge Lacome writing the opinion stated:

"Much is made in argument of the circumstance that members of the combination employ only agents who will agree to confine their business to selling passage tickets for such members. When the deplorable conditions which existed before this method of business was adopted are considered, it would seem that such an arrangement has greatly benefited the traveling public, especially the more ignorant class of many different nationalities which travels in the third class or steerage." (P. 974.)

It is therefore clear that on the facts of that case the Court was satisfied that the action of the members of the combination was reasonable. Judge Lacome did add:

[fol. 310] "Moreover, dealing as it does merely with the control of defendants' agents, who are free to accept or decline such agency, it is analogous to the case which was presented in United States v. Periodical Clearing House, supra, where, upon the question whether or not such control of agents was or was not within the act, this court was divided in opinion and dismissed the bill. No attempt was made to review that decision on appeal. It is thought, therefore, that complainant has not shown itself entitled to relief on this branch of the case." (P. 974.)

On appeal to the Supreme Court it was held that the intervention of the World War made the case moot. U. S. v. Hamburg-American S. S. Co. 239, U. S. 466 (1916).

In the second case, U. S. v. Moore, 275 Fed. 992 (S. D. N. Y., 1920), Judge Mayer considered the sufficiency of an indictment charging that a combination of steamship companies and others had agreed with brokers, who were agents of shippers, that they as such agents would maintain the steamship companies' quoted rates without discrimination among shippers. Judge Mayer expressed approval of this agreement. At the same time he found that the indictment in charging an agreement to pay brokerage only to members of a certain brokerage association failed to show that interstate commerce was thereby affected.

There is no suggestion whatsoever in the present case that defendants in respect to the dealings with their brokers and warehousemen did not substantially affect interstate commerce. Cf. Anderson v. Shipowners Ass'n., 272 U. S. 359, 364 (1926). The Hamburg-American and Moore cases, insofar as here applicable, hold merely that concerted regulation of the dealings with brokers, if in fact found reasonable, does not violate the anti-trust laws. If the intimations in the Hamburg-American case that regulation of agents deserves special treatment under the anti-trust laws were deemed a decision, it would not be controlling in the light of Anderson v. Shipowners Ass'n., supra. In that case, suit had been brought by a seaman to enjoin under the anti-trust laws associations of shipowners, etc. from concertedly controlling employment on their ships. The bill charged that the association required every seaman seeking employment to

[fol. 311] "register, receive a number and await his turn according to the number, before he can obtain employment, the result of which is that seamen, well qualified and well known are frequently prevented from obtaining employment at once, when, but for these conditions, they would be able to do so. A certificate is issued to each seaman which he is obliged to carry and present in order to obtain employment. The certificate, in part, recites that no person will be employed unless registered; that the certificate must be delivered to the master of the vessel upon articles being signed; that the certificate is the personal record of the seaman and the basis of his future employment. At the same time, two cards are issued,—one to the seaman, assigning him to a specified employment, and another to the ship, reciting the capacity in which the seaman is to be employed, with the statement that 'he must not be employed on your ship in any capacity unless he presents an assignment card, grey in color, issued by us and addressed to your vessel designating the position to which we have assigned him.' The associations fix the wages which shall be paid the seaman. Under the regulations, when a seaman's turn comes, he must take the employment then offered or none, whether it is suited to his qualifications or whether he wishes to engage on the particular vessel or for the particular voyage; and the officers of the vessels are deprived of the right to select their own men or those deemed most suitable. Without a compliance with the foregoing requirements, no seaman can be employed on any of the vessels owned or operated by members of the association." (P. 361-2.)

The bill further alleged that complainant had lost employment on one occasion because of the associations' rules.

In reversing the lower courts, the Supreme Court said:

"From these averments, the conclusion results that each of the shipowners and operators, by entering into this combination, has, in respect of the employment of seamen, sur-[fol. 312] rendered himself completely to the control of the associations." (P. 362.)

After determining that the conduct of the associations restrained interstate commerce, the court concluded:

"Taking the allegations of the bill at their face value, as we must do in the absence of countervailing facts or expla-

nations, it appears that each shipowner and operator in this widespread combination has surrendered his freedom of action in the matter of employing seamen and agreed to abide by the will of the associations. Such is the fair interpretation of the combination and of the various requirements under it, and this is borne out by the actual experience of the petitioner in his efforts to secure employment. These shipowners and operators having thus put themselves into a situation of restraint upon their freedom to carry on interstate and foreign commerce according to their own choice and discretion, it follows, as the case now stands, that the combination is in violation of the Anti-Trust Act." (Pp. 364-5.)

What is there said in relation to seamen as employees is, in my judgment, equally applicable to agents. The test of the legality of such concerted action is its reasonableness. Therefore defendants' second argument adds nothing to its first.

(c) Two other matters relating to defendants' dealings with brokers and warehousemen remain to be considered.

(1). Fixing of brokerage fees.

The agreement in this respect concertedly fixed the brokers' commission for negotiating contracts pertaining to and thereby substantially restrained inter-state commerce. The commission is an important element in the cost of sugar. The evidence indicated that there was active competition for brokerage service prior to Institute action regulating brokers' commissions. Fairness in the commission rate does not validate an agreement, otherwise [fol. 313] illegal. Trenton Potteries case, supra; cf. too, Anderson v. Shipowners Ass'n., supra, at p. 362. In Appalachian Coals case, the court found, (p. 375), that there was no "intent or power to fix prices". Such intent and power with respect to brokerage fees is present here. The legality of the "uniform commission rule" in Chamber of Commerce v. Federal Trade Commission, supra, does not appear to have been in issue. 13 Fed. (2d), at p. 691.

(2) Brokers and Warehouse Agreement.

To the extent that the brokers pledge imposed an obligation to support defendants' actions generally, it is plainly

an unreasonable restraint inasmuch as those actions are themselves in large part so. The requirement that brokers refrain from giving rebates is subject to like condemnation, although refiners, independently, might well impose such a restraint on their agents. I reach a similar conclusion with respect to the agreement requiring warehouses to refrain from rebates and concessions to any customers with a penalty for its violations. Defendants professed aim of preventing secret arbitrary discrimination could have been realized by less drastic means.

5. Transportation matters

(a) Defendants contest plaintiff's claim of illegality as to Code 3 (c) because as they contend, it was a reasonable means of preventing discrimination.

The issue however, is not, as defendants suggest, moot. In their brief, they recognize the desirability of the principle as a solution for refiners' transportation problems. (Fact Brief p. 193). There is substantial danger that they may again attempt to make Code 3 (c) or a similar principle effective. In these circumstances, plaintiff is entitled to assurance that Code 3(c) and defendants' activities under it, if found illegal, will not be revived. U. S. v. U. S. Steel Corp. 251 U. S. 417, 445 (1920); Goshen Mfg. Co. v. Myers Mfg. Co., 242 U. S. 202 (1916).

Extensive discussion is unnecessary to demonstrate that Code 3(c), the code ruling adopted thereunder, and defendants' actions pursuant thereto, constituted an unreasonable [fol. 314] restraint of trade. Transportation cost is a very substantial element in the cost of sugar to the consumer. Because the routes available to the several refiners are not the same, the cost of getting their sugars to the trade frequently differs. They sought concertedly, as the discussion of facts has shown, to put into effect an arbitrary uniform freight rate for all deliveries ex-consignment, regardless of actual cost. This was the vital feature of the plan. In thus concertedly fixing a substantial element in the price of sugar without any demonstration or even real consideration of the reasonableness of the charge, I find that defendants acted unreasonably and therefore illegally.

(b) Defendants, relying entirely upon their contention that they have not been shown to have concertedly insti-

tuted and/or maintained the delivered price system, offer no argument to sustain the legality of concerted action in that respect. The charge for transportation service thus fixed and maintained, is even more patently unreasonable than in the case of Code 3 (c); it bears no reasonable relation whatsoever to the actual cost of the service performed for the purchaser.

In U. S. v. American Linseed Oil Co., supra, a combination of manufacturers acting somewhat analogously to the refiners, was held illegal even though purchasers were given the option of buying f. o. b. factory. See opinion below, 275 Fed. 939, 945 (N. D. Ill., 1921). The defendants in that case maintained a zoning system for determining freight charges, 262 U. S. at p. 386. In the Maple Flooring Ass'n. case, supra, the evidence was undisputed that the defendants quoted and sold f. o. b. mill whenever a purchaser so requested. In that case the court said, p. 571,

"the mills of most of the members of the Association are located in small towns in Michigan and Wisconsin and * * * the average freight rates from these principal producing points in Michigan and Wisconsin to the principal centers of consumption in the United States are approximately the same as the freight rate from Cadillac, Michigan, to the same centers of consumption. There is abundant evidence that there were delays in securing quo-
[fol. 315] tations of freight rates from the local agents of carriers in towns in which the factories of defendants are located, which seriously interfered with prompt quotations of delivered prices to customers; that the actual aggregate difference between local freight rates for most of defendants' mills and the rate appearing in defendants' freight-rate book based on rates at Cadillac, Michigan, were so small as to be only nominal and that the freight rate-book served a useful and legitimate purpose in enabling members to quote promptly a delivered price on their product by adding to their mill price a previously calculated freight rate which approximated closely to the actual rate from their own mill towns."

In the Cement case,

"The custom in the cement trade of selling cement at a delivered price which includes the mill price, the price

of bags and freight charges, was an established trade practice before the organization of the defendant association. As required by the by-laws of the defendant association, it has distributed to its members freight-rate books, listing freight rates from established basing points to practically every city and town in the northeast section of the United States. The freight rates contained in the freight-rate book are compiled from the official tariffs and translated from the rate per ton of the official tariffs into the rate per barrel of 380 pounds, the unit for the sale of cement. Similar lists of freight rates embracing substantially the same subject matter were prepared and used by individual manufacturers before the organization of the defendant association. The association freight-rate book took the place of previous separate publications by individual manufacturers, with a consequent saving of money and increase of accuracy and a more thorough and continuous checking of rates. The basing points from which freight rates were calculated were not selected by the as- [fol. 316] sociation, but were the same as those appearing in prior books published by individuals before the publication of the Association freight-book. The basing points are points of actual shipment from which the larger proportion of the cement in a given locality in which cement is manufactured is actually shipped. The rates published are the actual rates omitting fractions of cents between the basing points and actual points of delivery." (268 U. S. at 597.)

So far as appears from this opinion, there was no evidence that defendants there sought to maintain delivered prices in the face of a threatened breakdown. The facts of these two cases differ manifestly from those of the sugar industry in respect to transportation matters.

The concerted maintenance of artificial freight applications substantially higher than those which customers would otherwise have to pay, is clearly an unreasonable restraint of trade. I express no opinion on the legality of a delivered price basis, if instituted and maintained by each refiner independently. Cf. In the Matter of U. S. Steel Corp., 8 F. T. C. 1 (1924).

(c) For reasons more fully outlined in discussing the legal consequences of the Institute's open announcement

plan and reporting activities, the practice in announcing freight change must in the circumstances of this case be held illegal. They were used moreover, in aid of other illegal activities relating to delivered prices and code 3 (c).

The so-called "freight book" was really a digest of selling terms. Unlike the "freight-rate books" in the Cement and Maple Flooring cases, it filled no real need of the industry. Individual refiners had accurate books of their own upon which they depended. At best the Institute service can be justified, if at all, as a slight "convenience." Against such justification must be weighed the proven danger of the freight book as revealed in the practice of using it to further other illegal activities. As the four payment plan incident shows (see pp. 107-8 of this opinion), it offered an opportunity subtly and in ostensibly innocuous fashion to achieve ends which the Institute's own counsel had frowned upon. In my judgment, it is so closely related to the other illegal activities, that it must fall with them.

[fol. 317] (d) As already indicated, defendants' concerted activities in obtaining changes in railroad transit tariffs were not improper. But insofar as defendants' other activities relative to transiting and diversion were designed to preserve the artificial freight structure, they are illegal.

The legal consequences of the regulation of trucking has been sufficiently indicated in the discussion of the boycott of brokers and warehouses. Defendants' actions with respect to pool cars and cargoes and switching are analagous to those described in Sections VIII and IX, the legality of which are presently considered.

The "rumors" of rebating upon which defendants predicated their action with respect to water carriers, do not justify the coercive concerted tactics which defendants employed. The water carriers were under no duty publicly to announce their rates in advance and defendants have not shown that the pre-Institute practices of the water carriers were subversive of sound competition.

6. The absence of justification for defendants' activities described in Sections VIII and IX has been indicated therein. The practices there considered, which defendants sought concertedly to prohibit and limit are not in them-

selves unfair or subversive of sound competition.[30] If defendants had shown, as they have not, that the various practices were in themselves "destructive" (Appalachian Coals case, supra, at 362-3), a different question would be presented (id. 373-4.)

Prior to the Institute, some of them were used as a means of granting secret, unfair and perhaps illegal con- [fol. 318] cessions. For the alleged purpose of averting these wrong doings or preventing discrimination, defendants have gone much further than necessary, in prohibiting numerous trade practices clearly beneficial not only to the customers but to the refiners, such as long term, tolling and used bag contracts and quantity and other special discounts on sales of the kind that effect economies for the refiner. Similarly, under the guise of preventing waste, they have drastically cut out consignment points clearly beneficial to substantial elements in the trade and with the asserted object of developing better business practices, they have imposed substantial but unnecessary restraint upon the credit terms. In nearly all of the matters considered in Sections VIII and IX of this opinion, not only were their actions far more drastic than they were willing to admit, but their professed and their real aims were

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[30] Able commentators in discussing a list of strikingly parallel trade practices have described them as—

"acts which not only are not unfair but under ordinary conditions are not even objectionable except as all competition is objectionable to a competitor. In other words, making due allowance for special business conditions that might convert a normally fair practice into an unfair one if all the circumstances could be known * * * [these] practices * * * merely mean direct or indirect price competition * * *

"The only way in which these aggressive and uncomfortable methods of competition can be shown to be unfair is by establishing that their perpetrators, either in ignorance of their costs or with reckless disregard of consequences, are headed for bankruptcy and are contributing to unhealthy conditions in the industry." See Isaacs and Taeusch, The NIRA in The Book And In Business, 47 Harv. L. Rev. 458, 573, 475 (1934).

widely different. Code 3 (g) condemns "special services to customers without appropriate charges therefor". Although, as the discussion of the facts shows, the additional cost of consignment service could be and at times was recouped by the refiner in his charge for transportation, defendants agreed that a specific service charge should be made on all l. c. l. deliveries ex-consignment. This Code provision was the basis for the requirement of a separate charge for each element in the cost of the sugar, even though that element might have been included in some other charge; it furnished an excuse for an additional charge, regardless of whether it was reasonably justified.

Insofar as defendants, without offering any substantial factual basis for their contentions, seek to justify their activities by attempting to show that the practices which they have restrained are in the long run economically unwise, they but argue against the wisdom of the competitive system.

Further discussion seems unnecessary in view of the full consideration of the evidence relating to those matters in the earlier part of this opinion. As to consignment points, service charge on l. c. l. deliveries, long term contracts and contract enforcement, tolling, quantity and other special discounts, credit terms, the guarantee, containers, used bag allowances, private brands, second-hand and damaged sugar and frozen stocks, I find that defendants have concertedly imposed substantial restraints upon competition, unreasonably because without sufficient justification therefor. I reach a similar conclusion with respect to the activities concerning pool cars and cargoes and switching described in Section VII.

[fol. 319] Findings and Decree

The Government seeks the dissolution of the Institute as well as a decree enjoining all defendants from further engaging in all the alleged illegal activities of the conspiracy. Defendants, on the other hand, have presented their case with a view to obtaining complete vindication for all their activities. As the foregoing discussion indicates, each side must fail in part.

The problems confronting the refiners have been found to be in many instances neither fancied nor slight; but the record has revealed a striking absence of effort on defendants' part to approach their solution in a truly disinter-

ested and constructive spirit; too often, they have disregarded the true facts and the interests of the distributors and consumers. They have contended that their guiding motive has been the elimination of secret discrimination, fraud and waste; in most of their activities, however, they have been found to have gone much further than was necessary to accomplish these ends. It is clear that their dominant aim was to preserve uniformity in price structure and to maintain relatively high prices, to relieve themselves of burdensome competitive devices and to make absolutely certain that, regardless of the injury to the public, no secret concessions should be given. It is, however, clear that conditions in the industry prior to the Institute were in a number of respects subversive of sound and fair competition; further, that divorced from its illegalities, the Institute offers certain opportunities for effecting desirable results entirely consistent, in my judgment, with the kind of competition required under the Anti-Trust laws.

[fol. 320] All points presented by counsel have been considered and I have endeavored to state my conclusions as to each subject matter. While, as hereinabove indicated, most of the relief demanded by the Government must be granted, dissolution of the Institute, however, need not be decreed. Certain provisions of the Code of Ethics have not been specifically complained of in the petition and have been mentioned only incidentally in the course of the trial; as to these, I have refrained from expressing any opinion.

Some months ago, a conference was had with counsel respecting the effect on this case of the recent A. A. A. and N. R. A. legislation and of any code that may be approved pursuant thereto. It was agreed, except by counsel for the Spreckels interests, that at any rate until such a code shall have been formulated and approved, this case had not become moot. In the circumstances, it has seemed best fully to consider and to decide the case as submitted; if and when a code shall have been approved for this industry, the injunction decree may be modified or suspended to the extent, if any, thereby made necessary.

The motions hertofore made and several times renewed on behalf of defendant Spreckels Sugar Corporation and certain of its present and former officers, to dismiss as to them on the ground that they had ceased all active connection with the Institute before this suit was filed and that by reason of the Spreckels Company's insolvency, re-

ceivership and cessation of all business, no danger of the resumption of their wrongful activities was threatened, must be denied as to Spreckels Sugar Corporation and Rudolph Spreckels. The former has not yet been dissolved and may in some way be reorganized; the latter, ever a dominant figure in the Institute, an important one in the industry and still the principal figure in the Company, was conceded by his counsel as late as last October as "most interested in obtaining a reorganization of this Company if he could, and is still talking about it and still hoping that something will come of it".

In these circumstances, I cannot say that the danger of renewal of their former illegal activities has passed.

[fol. 321] As to defendants Harper and Stone, a different situation is presented. They have long since, though after suit was filed, joined a newly established sugar brokerage firm and since then have apparently had no other active connection with the industry. Brokers had not been made defendants in this proceeding. Assuming that the petition would have been sustained as against brokers jointly with the members of the Institute, I cannot deem this alone a sufficient reason how to retain them in the case and thus to make them alone of the many brokers defendants therein. Regardless of the situation when suit was filed, there seems now to be no impending threat by Harper or, with some little doubt, by Stone, of a renewal of the wrongs with which, in a capacity other than that of brokers, they were originally charged. As to those two defendants, the petition will be dismissed without prejudice.

A decree together with findings of fact, pursuant to the views hereinabove expressed, may be submitted.

[fol. 322] APPENDIX TO OPINION

Code of Ethics of The Sugar Institute, Inc.

Among the purposes for which this Institute was formed were the following:

To promote a high standard of business ethics in the industry; to eliminate trade abuses; to promote uniformity and certainty in business customs and practices; and to promote the service of the industry to the Public.

Accordingly, the organization of this Institute was a frank recognition, in and of itself, that customs and practices had grown up in the industry which were unsound and unbusinesslike, and which were harmful to producers and consumers alike. These customs and practices had resulted in confusion in the trade and discrimination as between purchasers, with a consequent uneven and uneconomic distribution of sugar to the public. The more important result to the industry was a demoralization and restriction of the retail trade in sugar and a retardation of the normal increase of consumption.

Believing that the trade will welcome a rectification of those business methods of the industry which have served to promote discrimination between purchasers; and believing that the public will be better served if the present channels of distribution are preserved and enlarged by maintaining equality of business opportunity among merchants of sugar; and believing that the members of the industry will recognize that it is in the interest of the industry to encourage and promote the wider distribution of its product to the end of increasing its consumption;

The Institute declares its policy to be founded upon, and [fol. 323] recommends to its members the adoption of business methods in accordance with, the following principles, to wit:

1. All discriminations between customers should be abolished. To that end, sugar should be sold only upon open prices and terms publicly announced.

2. The business of the sugar refining industry is that of refining a raw product, the price of which to the industry is the controlling factor in the price which the industry receives for its own refined product; and the industry as a purchaser of raw sugar receives no concessions for quantity purchased. Concessions made by the industry for the quantity of refined sugar purchased have resulted in discrimination between customers, which discrimination the Institute believes it to be in the interest of the industry, of the trade and of the public to avoid. The Institute accordingly condemns as discriminatory, and in so far as this industry is concerned, as unbusinesslike, uneconomic and unsound, concessions made to purchasers on the basis of quantity purchased.

3. The following trade practices if not uniformly employed with all customers of a refiner are discriminatory. Furthermore, if not secretly employed they will of necessity be generally demanded, with the result that they must then be uniformly employed or abandoned. If uniformly employed they amount to a general price concession which should frankly take the form of a price reduction. The Institute condemns them as unethical except when practiced openly; as discriminatory unless uniformly employed; and in any event as wasteful and unbusinesslike.

(a) Variations from the open and publicly announced prices and terms, including (but without limiting the generality of this clause) the following:

[fol. 324] Special allowances by way of discounts, brokerage, storage or advertising; variations from openly announced grade or package differentials; reduction or substitution of grades or packings; delayed billings; full discounts in cases of delayed payment; and rebates or other allowances by any name or of any nature.

(b) Split billings, except on cars moving on an 80,000 lb. minimum and rate.

(c) The use of differential rates on consignments, or otherwise than on direct shipments over differential routes at customers' request.

(d) Payment of brokerage where any part thereof inures to the benefit of the purchaser.

(e)* Storage of sugar in warehouses in which customers or brokers are interested, or with which they are in any way affiliated.

(f) Allotments to brokers running beyond the close of business of the day on which an advance in price is announced by the refiner.

(g) Special services to customers without appropriate charges therefor.

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* Sub. Par. E originally read:

"Storage of sugar in customers' warehouses" and was amended to read as printed above by resolution adopted May 2, 1929.

(h) The sale of second-hand sugar by refiners.

(i) Sales for export under contracts which do not provide for shipment out of the country.

[fols. 325 & 326] 4. The factors which enter into and determine the cost of his product for the refiner are so largely outside his control, and the probable margin of his profit so small, as to render highly speculative and unsound the giving by him of options to purchase his sugar. Furthermore, unless equally available to all customers alike, the giving of options is discriminatory. The Institute condemns the giving of options by refiners.

5. In the interest of a more even distribution to the trade, the Institute recommends that sugar shall be consigned only to recognized detention points for reshipment, or to recognized markets and then in care of railroad or steamship lines or to public * warehouses, and that the control of the sugar shall remain with the refiner.

6. The Institute recommends the use by members of uniform contracts to be adopted by the Institute for Eastern, Southern and Western markets.

[fol. 327] IN UNITED STATES DISTRICT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Findings of Fact and Conclusions of Law

[fol. 328] This case having been tried in the United States District Court for the Southern District of New York, before the undersigned, Julian W. Mack, United States Circuit Judge, from February 9, 1932, to September 23, 1933, and having been argued January 16, 1933, to January 20, 1933, and on October 17, 1933, by James Lawrence Fly and Walter L. Rice, Special Assistants to the Attorney General, for the Government, by John C. Higgins, John Dick-

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* The words "or brokers" appearing before the word "warehouses" were stricken out by resolution adopted May 2, 1929.

inson and S. Pearce Browning, Jr., for all of the defendants except Spreckels Sugar Corporation, Rudolph Spreckels, W. W. Harper and Edgar H. Stone, and Cornelius W. Wickersham for the four defendants last named and, on October 17, 1933, also by Manfred W. Ehrich, then appearing specially for Godchaux Sugars Inc., and briefs having from time to time been presented and the Court having rendered an opinion herein on the 7th day of March, 1934, having been again on July 27th and 28th, 1934, argued on proposed findings of fact, conclusions of law and final decree, upon the pleadings and exhibits filed, stipulations made, evidence admitted, and after consideration of the briefs and oral arguments, the Court pursuant to Equity Rule 70½ to make more specific the findings and conclusions reached in said opinion, makes the following special findings of fact and reaches the following conclusions of law and for reference to the evidence and reasons in support of the several findings and conclusions refers therein to the pages of said opinion as filed.

Findings of Fact

1. Parties and the Sugar Industry

1. The Sugar Institute, Inc., hereinafter referred to as the Institute, was organized in December, 1927, under the Membership Corporation Laws of New York, as a trade association for the cane sugar refining industry of the United States. It began its operations on January 7, 1928. Its headquarters were and are in New York City. (0.1.)

2. The following 15 defendants, comprising all of the important cane sugar refining companies of the United States, are or have been members of the Institute, and are organized and own refineries in seaport cities as indicted in the following table:

Name of Defendant Company	Type of Organization	Location of Refineries
The American Sugar Refining Company.	New Jersey Corporation	Boston, New York, Philadelphia, Baltimore, New Orleans.
[fol. 329]		
Arbuckle Bros. (Margaret A. Jamison, Martha A. Jamison.)	Partnership (Margaret A. Jamison and Martha A. Jamison doing business under the firm name and style of Arbuckle Bros.)	New York.

Name of Defendant Company	Type of Organization	Location of Refineries
California & Hawaiian Sugar Refining Corporation, Ltd.	California Corporation	Crockett, Cal. (near San Francisco).
Colonial Sugars Co. (subsidiary of Cuban-American Sugar Co. which is also a defendant).	New Jersey Corp	Gramercy, La. (near New Orleans, La.)
Godchaux Sugars, Inc. William Henderson (William Henderson, Hunt Henderson, Christian J. Gambel, Frederick A. Gambel.).	New York Corp., Partnershi (William Henderson, Hunt Henderson, Christian J. Gambel, and Frederick Gambel, doing business under the firm name and style of William Henderson.)	Reserve, La. (near New Orleans), New Orleans, La.
Imperial Sugar Co	Texas Corp	Sugar Land, Tex.
W. J. McCahan Sugar Refining & Molasses Co.	Delaware Corp	Philadelphia, Pa.
The National Sugar Refining Co., of N. J.	New Jersey Corp	3 refineries near New York.
Pennsylvania Sugar Co	Pennsylvania Corp	Philadelphia.
Revere Sugar Refinery (Subsidiary of the United Fruit Co.)	Massachusetts Corp	Charlestown, Mass.
Savannah Sugar Refinery Corporation.	New York Corp	Savannah, Ga.
Spreckels Sugar Corp	Delaware Corporation	New York.
Texas Sugar Refining Corp.	Delaware Corporation	Texas City, Texas.
[fol. 330]		
Western Sugar Refinery (J. D. and A. B. Spreckels Securities Company)	California Corp. (J. D. and A. B. Spreckels Securities Co., doing business under the trade name and style of Western Sugar Refinery).	San Francisco.

The foregoing corporations and partnerships will hereinafter be called members or refiners and their trade and corporate names will be abbreviated.

3. Each of the individual defendants has taken an active and responsible part in his refining company and also, at various times, in the management of the Institute and in the combination and conspiracy herein set forth. Since the organization, each of the following individual defendants has held, inter alia, the respective positions indicated in the following list:

Name	Affiliation
J. F. Abbott	Director of the Institute and President of American Sugar Refining Co.
Earl D. Babst	President and Honorary President of the Institute and Chairman of the Board of Directors of American Sugar Refining Co.
W. Edward Foster	Director of the Institute and Vice Chairman of the Board of Directors of the American Sugar Refining Co.

Name	Affiliation
J. P. Cody	Sales Manager of Arbuckle Bros.
M. E. Goetzinger	Secretary, Member of the Executive Committee and Director of the Institute, and General Manager of Arbuckle Bros.
George N. Rolph	Director of the Institute and President of California & Hawaiian Sugar Refining Corp., Ltd.
William B. Tyler	Director of the Institute and officer of California & Hawaiian Sugar Ref. Corp. Ltd.
C. B. Newman	Sales Manager, Colonial Sugars Co.
George E. Keiser	Director of the Institute and President of Colonial Sugars Co.
Jacob Moog	Director and member of the Executive Committee of the Institute and Senior Vice-President of Godchaux Sugars, Inc.
I. H. Kempner	Director of the Institute and President of Imperial Sugar Co.
[fol. 331]	
Harry G. Thompson	Director of the Institute and Sales Manager of Imperial Sugar Co.
Louis V. Place	Director of the Institute and Vice-President of W. J. McCahan Sugar Refining & Molasses Co.
Manuel E. Rionda	Treasurer of the Institute and President of W. J. McCahan Sugar Refining & Molasses Co.
James H. Post	Chairman of the Board of Directors and President of the Institute, and President of National Sugar Refining Co., Chairman of the Board of Cuban-American Sugar Co.
Charles D. Bruyn	Director and member of Executive Committee of the Institute and Vice-President of National Sugar Refining Co.
William H. Hoodless	Chairman of the Board of Directors and member of Executive Committee of the Institute and Vice-President of Pennsylvania Sugar Co.
Henry E. Worcester	Vice-President, Member of Executive Committee, and Director of the Institute, and Vice-President of Revere Sugar Refinery.
Benjamin O. Sprague	Director of the Institute and President of Savannah Sugar Refining Corp.
Thomas Oxnard	Director of the Institute and Vice-President of Savannah Sugar Refining Corp.
Rudolph Spreckels	President and Director of the Institute and President of Spreckels Sugar Corp.
W. W. Harper	Vice-President of Spreckels Sugar Corp.
Edgar H. Stone	Director of the Institute and Director of Spreckels Sugar Corp.
H. B. Moore	Director of the Institute and Vice-President and General Manager of Texas Sugar Refining Corp.
Frank E. Sullivan	Vice-President and Director of the Institute and Executive Vice-President of Western Sugar Refinery.
Fred G. Taylor	Executive Vice-Secretary of the Institute.
*Alexander Smith	Director of the Institute and President of Texas Sugar Refining Corp.

[fol. 332] 4. Defendant Spreckels Sugar Corporation, which was organized under the control of the defendant Rudolph Spreckels, on January 22, 1929, to take over the assets of the Federal Sugar Refining Company, a cane sugar refining company controlled by the Spreckels family, became insolvent and closed its refinery August 29, 1930; from the time that the refinery was closed to February 16,

1931, it was engaged in liquidating and selling its sugar stocks; its resignation from the Institute submitted December 8, 1930, was accepted January 29, 1931; since the end of December, 1930, it, as well as defendant Rudolph Spreckels, W. W. Harper and Edgar H. Stone have been wholly separated from the activities of the Institute; it was placed in the hands of receivers January 19, 1932. Rudolph Spreckels took a leading, substantial and active part in the organization of the Institute and he and the Spreckels Sugar Corporation took such part in the combination and conspiracy herein set forth; from the time of the appointment of the receivers continuously up to at least October, 1933, Rudolph Spreckels was endeavoring to effect a reorganization of the said corporation. I find substantial probability that Rudolph Spreckels and Spreckels Sugar Corporation will resume operations in the sugar refining industry, and, unless restrained, will engage in at least some of the activities enjoined by the decree in this clause. (O. 183.)

5. Early in 1932, defendants W. W. Harper and Edgar H. Stone, with the exception of Stone's retention of his vice-presidency in the Spreckels Sugar Corporation, definitely withdrew from the cane sugar refining industry and the activities herein set forth; I find no substantial probability that either of them will resume any of said activities. (O. 184.)

6. Defendants William Henderson and George M. Rolph have died since the beginning of the trial.

7. The 15 members refine virtually 100% of the imported raw sugar processed in the United States. (O. 1.)

8. Prior to the formation of the Institute, the members provided in excess of 80% of all sugar, including beet sugar, consumed in the United States. Since the formation of the Institute members have supplied 70% to 80% of the sugar consumed annually. (O. 1 & 2.)

9. In some states, particularly in the New England and Middle Atlantic areas, defendants refiners supply more than 90% of the sugar consumed. They supply more than 55% in all except a few states. (O. 1 & 2.)

10. The refiners sell and contract for sale and delivery and, pursuant to such sales and contracts, ship and deliver

refined sugar by rail, water, truck, and various differential routes into various states other than the states where their refineries are located. Each of the refiners is engaged extensively in interstate trade and commerce in sugar, and the activities of the combination and conspiracy herein set forth relate directly and substantially to such interested trade and commerce. The raw sugar from which the refiners make refined sugar is imported. Ample supplies of raw sugar in a market which until recent rises had been steadily declining have been available since the formation of the Institute. Sugar, as referred to herein, generally refers to refined sugar cane. (O. 3.)

[fol. 333] 11. The firm of W. H. Edgar & Son of Detroit, which merchandised about 2% of all the sugar consumed in the United States, as well as beet and off-shore sugar interests, offered substantial competition to the defendants. The Institute sought and obtained from all of these interests a high degree of cooperation. (O. 3-6, modified by R. 1636.)

12. Beet and off-shore su[illegible]xcept Hershey's offshore) have always sold at a diff[illegible]al below domestic refined. (O. 3-4.)

13. The Domestic Sugar Bureau with headquarters in Chicago is the trade association of the domestic beet sugar manufacturers; its relationship to the members of that industry is similar to that of the Institute to defendant refiners. It was formed about the same time as the Institute and incorporated soon thereafter. Its code of ethics is patterned after and substantially identical with that of the Institute. In connection with practically all Institute activities, it has sought and obtained a high degree of cooperation from the Bureau. Joint meetings have been held, questions of policy have been discussed and joint action has been taken. The two associations have continuously communicated with each other by letter, telegraph and personal contact. (O. 4.)

14. I find that there was no agreement between defendants and the beet sugar manufacturers to maintain any differential. (O. 4.)

15. The off-shore sugar sale in this country is in the hands chiefly of four selling agencies, namely, H. H. Pike & Co., L. W. & P. Armstrong, Lamborn & Co., and Lowry

& Co., all brokers, each of whom represents a different off-shore refining interest. (O. 4-5.)

16. I find that there was no agreement between defendants and the off-shore interests to maintain any differential between domestic refined and off-shore sugars. (O. 5.)

17. The defendants' refined cane sugar is a thoroughly standardized commodity in physical and chemical properties. In certain exceptional cases and localities, certain of the defendants have built up a preference for certain brand names, sufficient before and after the Institute was organized, to enable such brands to command a higher price than the sugar of the other defendants in sales from sugar dealers to their trade. Both before and since the Institute, in sales by refiners to manufacturers of products containing sugar, which account for about one-third of the sugar consumed, price, not brand, was always the vital consideration; and in sales to the remainder of defendants' trade, one refiner could not ordinarily, by virtue of preference for his brand, obtain a higher price except insofar as another refiner might be giving a lower price by secret concessions. I find that the basis prices quoted by the several refiners in any particular trade area were generally uniform both before and after the Institute, because economically the de- [fol. 334] fendants' sugar, save for exceptional instances was and is a thoroughly standardized product. (O. 3, 3 Ln. 8, 141-3; cf. finding No. 201.)

18. I find that while price variations in different trade areas throughout the country, frequent before the Institute, have been less marked since that time, the elimination of such territorial difference in prices was not due to direct agreement. (O. 143.)

II. Pre-Institute Secret Concessions

19. Prior to the formation of the Institute in December, 1927, and its beginning of active operation on January 7, 1928, defendant refiners competed actively and vigorously with each other and with beet sugar companies, off-shore refiners and large distributors on prices, terms, conditions, services, and all other material elements of price.

20. Beginning perhaps as early as 1921, and increasingly thereafter, the practice developed on the part of some but

not all refiners of giving secret concessions, actually or in effect from their basis price, in the highly competitive areas. Arbuckle, California & Hawaiian, Henderson, Revere and Western never indulged in this practice. The other and so-called "unethical" refiners gave secret concessions and by 1927, such concessions were given on a very substantial amount of all the sugar sold by them in the territories in which such concessions were granted. By fair estimate, at least 30% of all sugar sold by the Institute members in the United States in 1927 carried secret concessions of some kind. (O. 6 as modified by R. 5026.)

21. The need of secrecy was urgent, for if and as soon as it became known that a specific concession was granted it would be generally demanded. (O. 6.)

22. That concessions were widely granted was generally known in the trade. Each refiner, too, was able to find out in a general way the approximate prices, terms and conditions of his competitors. Many of the contracts carrying concessions revealed that fact on their face. But in the conditions prevailing prior to the Institute it was impossible for refiners and purchasers to know with any degree of accuracy the actual prices and terms granted in the innumerable transactions. The efforts at secrecy were at least fairly successful. (O. 6.)

23. Various causes contributed to the development of these selling methods on the part of the unethical refiners. Probably chief among them is an over-capacity since the war, of at least 50%. Among other probable causes were (1) the lack of statistical information as to the amount of production, deliveries and stocks on hand, causing over production; (2) the uncertainties prevailing in the raw market during this period which made the refined sugar industry highly speculative; (3) the fact that since 1922, most sugar has been sold through brokers and is thus somewhat outside of the refiners' control; and (4) standardization of the products of the several defendants, which has made the sale of their sugar dependent almost entirely upon prices, terms, and conditions. (O. 7, 145-n. 25.)

[fol. 335] 24. Concessions granted were largely, although not entirely, arbitrary in character. They were given principally to the large buyers of sugar, but no system was fol-

lowed in this respect and they were frequently granted to the smaller and denied to the larger purchasers. Even though misrepresentations may not have been extensively resorted to, I find that defendants entertained genuine fears that purchasers were falsely representing prices which they said they could procure from competing sellers. (O. 7.)

25. Consumption of sugar in the United States decreased in 1927. The public "slimness campaign" of that year had substantial effect in discouraging the use of sugar. Certain distributors refrained from pushing the sales because they could not sell profitably, but other distributors were aggressively making sales, and sugar was generally available to the trade. (O. 7-8.)

26. While certain smaller distributors suffered because of the advantage enjoyed by some larger ones, I find that such advantages were in largest measure attributable to the greater efficiency of the larger distributors, and that these distributors did not obtain monopolies. (O. 7-8.)

27. There is no substantial evidence that the pre-Institute situation caused or would cause substantial injury to the "ethical" refiners, as a class. These refiners may have been inconvenienced through the sales methods of some of their competitors, and probably believed their effect on them to be harmful, but they were in no danger of being eliminated from the industry and they had no part in the first steps taken to form the Institute. (O. 8.)

28. The declining profits for the year 1927 must be attributed, at least in large part, to causes other than the secret concession system, such as the "slimness campaign", the over-production and dumping that took place during that year. (O. 8-9.)

29. The industry was characterized by highly unfair and otherwise uneconomic competitive conditions, arbitrary, secret rebates and concessions were extensively granted by the majority of the companies in most of the important market areas and the widespread knowledge of market conditions necessary for intelligent, fair competition were lacking. The refiners were disturbed economically and morally over the then prevailing conditions. At least one refiner, American, was concerned about the possibility of liability

under the Clayton Act because of the discriminations resulting from the various concessions. (O. 9.)

III. The Sugar Institute

30. The formation of the Institute was preceded by a series of meetings of the refiners, commencing the summer of 1927, for a discussion of conditions in the industry with particular reference to undesirable practices, and secret concessions. (O. 9.)

31. In September, 1927, there was submitted to representative of the Attorney General's office a proposed Certificate of Incorporation and By-Laws for a trade association together with a number of suggestions respecting trade practices.
[fol. 336] A Code of Ethics, worked out in December was submitted to and discussed with officials in the Attorney General's office and as a result, some changes were made. (O. 10.)

32. The Code concertedly adopted on January 7, 1928, was substantially identical with that worked out when the discussions with the Department of Justice officials were held. With the exception of two minor changes, the Code has retained its original form. (O. 10.)

33. The Department of Justice in its three investigations of the Institute in 1928, 1929 and 1930 was given complete access to the Institute files. As new issues of the Code and Code Interpretations were printed, copies were forwarded to the Attorney General's office. The Department of Justice was not notified of various important steps taken by the Institute in connection with illegal restraints, nor was it notified as to those activities charged by the Government and denied by defendants in this case. The Department did not conduct a comprehensive investigation of the restraints involved in this case until the end of 1930, when an agent of the Department inspected the Institute files for a period of approximately one month. (O. 11)

34. The Institute has continuously maintained a highly paid executive, statistical, clerical and investigative staff. In February, 1928, Judge Sidney Ballou, until then general counsel of California & Hawaiian, became Executive Secretary of the Institute at an annual salary of $75,000. Upon

his death in October 1929, his duties were assumed by the Vice-Secretary, Fred G. Taylor, whose annual salary was $25,000. Other executives salaries amounted yearly to about $15,000. Other staff salaries are about $45,000 and overhead about $85,000. The Institute expended on the average, $450,000 annually, in an advertising campaign conducted by an independent advertising agency. In 1930 $29,000 was spent for investigations. The total expenses for that year were $838,000 of which $641,000 were for advertising and publicity. Expenses were defrayed by levy on the members proportionate to their production. (O. 10 as modified by R. 5232.)

35. Among the purposes of the defendants in organizing the Institute were: (a) the selling of sugar on open, publicly announced prices, terms, and conditions; (b) the gathering of trade statistics not previously available; (c) the elimination of practices which they deemed wasteful; and (d) the institution of an advertising campaign to increase consumption. But these purposes were for the most part only incidental to defendants' actual dominant purposes in forming and operating under the Institute. (O. 9.)

36. I find that defendants' dominant purposes in organizing the Institute were: to create and maintain a uniform price structure, thereby eliminating and suppressing price competition among themselves and other competitors; to maintain relatively high prices for refined, as compared with contemporary prices of raw sugar; to improve their own financial position by limiting and suppressing numerous contract terms and conditions; and to make as certain as possible that no secret concessions should be granted.

[fol. 337] In their efforts to accomplish these purposes, defendants have ignored the interests of distributors and consumers of sugar. (O. 160, 182).

37. At the inception of the Institute, defendants adopted a general agreement ostensibly to abolish all discriminations between customers but which in general purpose and effect amounted to an agreement not to afford different treatment to different customers, regardless of the varying

circumstances of particular transactions or classes of transactions and regardless of the varying situation of particular refiners, distributors or customers or classes thereof. Under the guise of performing the agreement, against discriminations, defendants limited and suppressed numerous important contract terms and conditions in the particulars herein set forth, chiefly for the purpose and with the effect of accomplishing the objectives described in finding 36. (O. 11, 158-160, 32, 51, 68, 71-72, 78, 82, 87, 90, 95, 96, 102, 103-104, 121, 126, 132, 140, 161-162, 169, 180-181.)

38. In their efforts to accomplish the dominant purposes stated in finding 36, defendants in most of their activities have gone much further than was reasonably necessary to accomplish their professed aims of eliminating fraud, waste and secret, unfair or illegal discrimination. (O. 182.)

39. The Institute held frequent meetings, including weekly meetings of the Executive Committee composed of certain members of the Board of Directors, monthly meetings of the Board of Directors composed of at least one representative of each refiner, annual and occasional special meetings of the Institute members, and other meetings of various committees. (O. 10.)

IV. Price Reporting and the Open Price Plan

40. Under the Institute, defendants agreed to sell, and in general did sell sugar only upon open prices, terms and conditions publicly announced in advance of sales, and they agreed to adhere and in general did adhere without deviation, to such prices, terms and conditions until they publicly announced changes. (O. 11, 20, 160.)

41. With the exception hereinafter noted in the case of California & Hawaiian, Members agreed to, and in general concertedly observed a detailed system of reporting prices, which requires that all price changes be publicly announced and posted and immediately thereafter be telegraphed to the Institute and by it immediately relayed by telegram to all members, the Domestic Sugar Bureau, offshore representatives, news agencies, ticker services and some distributors. A substantially similar system was agreed to and followed with respect to announcing and reporting changes in terms and conditions, with the exception that they were fre-

quently mailed instead of telegraphed. California & Hawaiian with the possible exception of a brief period in the early days of the Institute, neither reported to the Institute its changes in prices, terms, and conditions nor received Institute reports of changes in prices, terms and conditions of the other members. (O. 12, 14, 17-18.)

42. The price reporting system was not worked out in its final form until about a year after the formation of the Institute. In February, 1928, the following code interpretation was adopted by the directors:

[fol. 338] "Three O'clock Notice

Except to meet a competitive price already announced, the Institute recommends to its Members that they announce changes in price not later than three o'clock of the day before the changed price becomes effective. The first announcement of a change in price should be sent by telegram to the Executive Secretary, he to notify the other Members."

The second sentence meant merely that only the announcement of the refiner first to announce a change in price was to be sent to the Executive Secretary and notified by him to the other members of the Institute, not that all changes in price should be announced first to the Institute. This was the early practice and there was never any obligation to give the Institute the first notice of a change in price. The important requirement imposed upon the refiners was to make an open announcement to the trade. (O. 12-14.)

43. In the next printing of the Code, November 26, 1928, it was expressly provided that the trade should be notified by the individual refiners before the Institute was notified of a change in price and that the Institute should relay to all members all subsequent announcements. Although an Executive Committee minute of March, 1928, states that the "Executive Secretary expects all members to give him immediate notice of what they do or decide not to do", in practice, defendants did not notify the Institute when they chose not to follow a price change announced by another member. (O. 14.)

44. "Repricing" was a practice, customary in the trade, of making price declines retroactive to sales made at pre-

vious higher price. Usually this occurred when a decline was announced late in the day, and was applied to all of that day's business. During the first few months of the Institute, defendants attempted to prevent repricing and the "Three O'Clock Rule" as quoted above was drafted to prevent the practice. The prohibition proved inpracticable and in August, 1928, the attempt to eliminate all repricing was abandoned. Partial approval thereof was given in the next printing of the Code Interpretations in November, 1928, in the following terms:

"The custom of the trade permits giving the customer the benefit of the refiner's lowest price during the day, that is, a contract entered into or sugar delivered in the morning may be repriced at any lower price announced during the day."

Repricing has been practiced at least since August, 1928. Although expressly sanctioned only as to business of the day of the decline, refiners occasionally have repriced beyond that period. But the "Interpretation" just quoted was evidently intended to prevent this and must have had some effect in discouraging it. (O. 15.)

45. The present form of the Three O'Clock Rule is as follows:

"Except to meet a competitive price already announced, the Institute recommends to its members that they announce changes in prices not later than 3:00 o'clock. Such timely announcement will enable a price change to receive wide publication through the evening and morning papers. [fol. 339] It is, furthermore, in the interests of uniformity which will be appreciated by the trade."

As to decline in price, the effect of the rule was to compel announcement thereof before 3:00 o'clock in the afternoon. With respect to announcing price advances, the practice under the Institute pursuant to the rule differed from that which had theretofore prevailed. The great bulk of sugar always was and is purchased on what is known in the trade as "Moves", although very substantial quantities are sold from time to time apart from moves. A move occurs when a price advance is announced. Sometimes prior to the Institute, an advance was announced to go into effect im-

mediately; usually, however, to become effective at some future time. Regardless of the form of the announcement, [fol. 340] some period of grace was always allowed during which sugar could be bought at the price prevailing before the advance. In order to obtain their sugar at the lower price, the trade, unless they felt that the move occurred at too high a price, would then enter into contracts covering their needs for at least the next 30 days. (O. 15-16.)

46. Prior to the Institute, this period of grace allowed for purchasing at the old price was uncertain in duration. Sometimes it was very short, a matter of hours; sometimes sugar buyers who did not learn of the move in time, sent their orders in too late to buy at the old price. Until the Three O'Clock Rule was cast in its final form, it compelled a period of grace from 3 P. M. to the opening of business on the next day because its express language provided that changes in price should be made "not later than 3:00 o'clock of the day before the changed price becomes effective." Until the opening of business the day after the announcement, buyers were enabled to get the lower price. Early in 1929, the language just quoted was deleted from the provision. Why this was done is not apparent. Thereafter the price advance could have been made effective at once. But at this time the definite period of grace had doubtless become well established; in any event, refiners have not availed themselves of the Code privilege to effectuate an immediate advance. Price advances continued to be announced to become effective the following day or even later. (O. 16-17.)

47. The effect of the Three O'Clock Rule in and of itself, seems to have been advantageous to the trade in case of a price advance in that the uncertain period of grace has been replaced by a definite one. (O. 17.)

48. I find that the refiners did not consult with one another after an advance had been announced by one of them and that the grace period was not in fact used by them to persuade a reluctant member to follow the example set, despite the business necessity of withdrawing an advance unless it were followed by all. (O. 17.)

49. Prior to the Institute, general price changes were listed on the Refiners' Bulletin Boards, and brokers, customers and news agencies were notified, and frequently,

as a courtesy, competitors would be telephoned. Except for notifying the Institute, price changes during the post-Institute period have been announced in this way. Prior to the Institute the list prices which many of the "unethical" refiners announced were merely nominal quotation and bore no relation to the actual "selling bases" at which their sugar was sold. The published list prices and the "selling bases" of these refiners differed widely. The selling basis was the price at which they purported to sell; the secret concessions were from this basis. In the case of some of the "unethical refiners" changes in "selling bases" were made from time to time without formal public announcement in advance of sale. (O. 18-20.)

50. Before and since the Institute, the refiners have received information of the price changes of their competitors from customers, brokers and news agencies. Before the Institute, general price changes, including general changes in the selling bases of the "unethical" refiners, were disseminated and became known to the entire trade very quickly. (O. 18-20.)

[fol. 341] 51. A purpose and effect of the agreement to sell only on the basis of open public announcement in advance of sales was to aid defendants in preventing and limiting certain types of transactions in which private negotiations are essential. The actual adherence to the system of open announcements in advance of sales which has generally prevailed since the Institute is vastly different from the pre-Institute situation when there was a very substantial number of arbitrary secret concession transactions and other special arrangements. (O. 20, 95, 160-1.)

52. The assurance to each refiner that no competitor would vary his prices without advance notice tended in fact, as it naturally would tend, toward maintenance of price levels relatively high as compared with raws. (O. 161.)

53. Competition among sugar buyers was so keen that when a discrimination in favor of one became known, others similarly situated would ordinarily bring pressure to secure like favorable treatment. Either they would have succeeded or the discriminatory favor would have had to be withdrawn. It is reasonably certain that immediate publicity given to the prices, terms and conditions in all

closed transactions, which is not shown to have been impracticable, would in general have resulted in preventing any unfair competition caused by the secret concession system, without an agreement to sell only on the basis of open public announcement in advance of sales. (O. 125-6, 162.)

54. The use of the Institute for relaying announcements of prices, terms and conditions is an integral part of, and gives added support to defendants' plan to sell sugar only upon open prices, terms, and conditions announced in advance of sales. (O. 163.)

55. Data respecting price changes have been circulated by the Institute without comment. (O. 19.)

56. The agreement to sell only on prices, terms, and conditions announced in advance of sales, the actions pursuant thereto, and the reporting system in aid thereof, constitute undue and unreasonable restraint of trade. (O. 162-3.)

57. The Institute and Institute officials in a number of instances rebuked members and non-members for announcing or continuing terms and conditions more favorable than those recommended by the Institute or agreed to by defendants, and otherwise sought to and did induce withdrawal and limitation of such favorable terms and conditions, thereby unduly and unreasonably restraining trade. The use of the Institute as a clearing house for information concerning changes in terms and conditions aided in such activities. (O. 51-2, 103, 106-8, 111-113, 115-116.)

58. Defendants sought to develop and in respect to some matters developed a practice of giving the Institute and competitors advance notice of contemplated use of some competitive devices for the purpose and with the effect of enabling concerted, undue and unreasonable limitation of such practices. (O. 50, 84, 109, 122, 127, 137.)

[fol. 342]

V. Statistics

59. Some statistical information collected by the Institute was supplied only to each of the Institute members; some was supplied as well to representatives of certain or all of the off-shore refiners. (O. 22-3.)

60. The only data disseminated to the purchasing trade were: weekly statistics as to the total melt and total deliveries and monthly statistics of the total deliveries of all sugar, divided so as to show the amount of domestic cane, imported cane, and beet sugar delivered during the period. These statistics were widely distributed through news agencies, banks and brokers. (O. 23-4.)

61. The total refined stocks on hand could be computed by subtracting from the total melt of each week the total deliveries during each week, and defendants, during recent years when refined stocks were greatly increasing, continued to supply to the trade, weekly statistics on melt and deliveries, from which the trade could readily calculate such increase. (O. 24.)

62. Data as to the capacity of the several refiners were available to the public in substantially similar form to that obtained by the Institute. (O. 24.)

63. In May, 1931, after the bill in this suit was filed, statistics were released to the trade showing the total consumption of cane, beet, foreign and insular refined sugar by states, for the years 1928, 1929 and 1930, together with figures showing the percapita consumption of each state for the same years. (O. 24.)

64. None of the other statistics supplied to members or off-shore refiners were available except through the Institute, and none were supplied or available to the purchasing trade except as stated in findings 60, 61, 62 and 63. (O. 24.)

65. The statistics relating to total production, total deliveries, and calculable stocks, which defendants made available to the purchasing trade, could have had only limited significance for the individual purchaser, and were even likely to mislead him. Such information reflects only the general situation for the country as a whole and for all refiners. Vital data relating to production and deliveries of individual refiners, to deliveries by states, and to deliveries by states by all the important differential routes, to consigned and in-transit stocks for the several states, which would have illuminated the situation in the several trade areas where the competitive set-ups differed widely, were withheld from purchasers. By thus collecting and circulating only among themselves this information, the re-

finers obtained an unfair advantage with respect to purchasers. Perfect competition and defendants' professed policy of fostering such competition require that the purchasing trade as well as the sellers have the full, detailed information which defendants withheld. (O. 21-2, 52, 163-4.)

[fol. 343] 66. Defendants' failure to make complete disclosures to the trade of statistics referred to in findings 65 and 103, which they collected and circulated within their own ranks, is in itself an undue and unreasonable restraint of trade. (O. 167.)

67. After an unsuccessful attempt, the Institute did not collect and distribute statistics dealing with new business entered each week, which figures were necessary to estimate the demand. The Institute did not collect and distribute statistics dealing with stocks of raw sugar on hand with refiners or with prices paid therefor. The reasons for the failure to collect and distribute such statistics were chiefly the hostility of individual refiners and the possibility of jeopardizing the refiners' position with respect to sellers of raw sugar. None of the information, however, except that relating to the demand, was really important and the failure of the Institute to collect such statistics is no indication of bad faith or unfair dealing with the trade. In failing to collect and distribute such data, the defendants neither sought nor obtained any advantage, if it may be deemed an advantage, over purchasers, which they did not in fact possess individually prior to the Institute. (O. 26-7.)

VI.

Boycott of Brokers and Warehousemen

68. In the sale and distribution of sugar, brokers and warehousemen are essential. (O. 28, 168.)

69. Prior to the Institute, a broker and a warehouseman were frequently one, and/or also a merchant or other sugar user, and concerns which thus combined distribution functions frequently performed in various ways a valuable service to the industry. (O. 28, 32, 33.)

70. Defendants concertedly adopted against such combination of occupations, a policy of requiring an election

of only one of these business activities and the complete cessation of each of the others. Defendants entered into, faithfully observed and rigorously enforced an agreement that refiners should refuse to deal with a broker, warehouseman, or customer, who admittedly, or by Institute finding, was acting directly or indirectly for any of them, or for any beet, off-shore or other sugar interest, in other than the one elected capacity. Cooperation of the Domestic Sugar Bureau, off-shore and Eager interests was sought and obtained. (O. 28, 35.)

71. Defendants' policy against combination of functions by distribution agencies had its beginning at the inception of the Institute in Code of Ethics sections 3(d) and 3(e), but the program to compel complete separation of occupations was not finally developed until a special meeting of members, on May 2, 1929. Pursuant to agreement reached at that meeting, refiners at once telegraphed their brokers, warehousemen and customers, affected by the ruling, that they must elect one and only one of these business activities for their future dealings on behalf of or with the refiners. Machinery was set up within the Institute to effectuate this policy, An enforcement committee was created with high officials from a number of the refiners as its members. The Institute employed traveling investigators whose function it was to obtain evidence where combination was suspected. Individual refiners, when they discovered similar infractions of the rules, advised the In-[fol. 344] stitute, which in turn circulated and acted on the information. When a broker or warehouse was believed to combine functions either directly or through indirect affiliation with another concern, the committee reviewed the evidence; if it found such combination, the concern was disqualified from acting as a broker or warehouseman. (O. 34.)

72. Each refiner submitted to the Institute lists of its brokers and warehouses, which were then circulated among all the refiners. The purpose of circulating the lists was to aid in the enforcement of the policy against combination of functions. When brokers or warehouses were disqualified, they would, as a matter of course, be dropped from the lists. If refiners wished to use a warehouse not on the list, they were required to notify the Institute of their intention, so that other Institute members could voice any

objection they might have and so that the Institute might have opportunity to investigate the proposed warehouse to determine whether it was in fact independent of any other distribution agency. At first only 48 hours notice had to be given. The period was extended from time to time until at last six days notice was required. (O. 34.)

73. A combination of distribution functions in a single concern facilitated and was used to facilitate the grant by refiners of secret concessions, difficult of detection, by paying unearned brokerage or storage commissions, and by acquiescing in or authorizing the delay of withdrawal reports by customer-warehouse or broker-warehouse concerns. (O. 28, 29, 32.)

74. Concerns which combined activities, largely because of such combination, were enabled to and some of them did delay withdrawal reports and charge unearned storage without refiners' consent. The extent of such fraudulent practices prior to the Institute were substantial. (O. 29-30.)

75. As brokers and warehousemen have special duties to refiners, combination of distribution functions by such concerns creates opportunity for double dealing because of the introduction of an interest adverse to the refiner, and the value to the refiner of a concern which engages in two or more activities may be frequently impaired. But, despite adverse interests known to the refiners, it was common for them, prior to the Institute, to employ brokers and warehousemen that engaged in other distribution functions and such arrangements from the refiners' viewpoint were not infrequently entirely successful. (O. 30.)

76. Concerns in substantial numbers, which combined distribution functions, maintained entire honesty and good faith in their dealings with the refiners. (O. 30.)

77. There is a definite possibility of lower prices to ultimate consumers as a result of combination of functions because the increased income received from two or more activities, even apart from the advantages obtained through secret concessions and frauds, provides an opportunity for the concern engaging therein to out-sell competitors who engage in only one occupation. Combination of functions thus threatened the uniformity of price structure, and this threat, defendants feared. (O. 31, 169.)

78. There is no substantial evidence that the pre-Insti-
[fol. 345] tute secret concessions and fraudulent practices did or would lead to monopolies among the distribution agencies. If, apart from advantages obtained through secret concessions and frauds, the opportunity enjoyed by a concern which combined occupations to reduce charges or prices below those of a competitor who cannot or will not effectuate like combination, should lead to the elimination of the latter, it would be the natural result, not of discriminatory practices, but of fair competition as between economically unequal competitors. (O. 32-3, 169-170.)

79. Defendants' purposes in compelling the separation of occupations were: (a) to assure the refiners, distrustful of one another, that no one of them could successfully use such combination to facilitate secret concessions; (b) to prevent fraudulent practices by the distribution agencies in their dealings with and on behalf of the refiners; and, most important, (c) to aid in preserving the uniformity of price structure which they aimed to maintain. (O. 29, 31-2, 169-171.)

80. Defendants' policy against combination of functions was effectuated in a harsh and arbitrary manner without regard to the effect upon third parties; (a) Under the Institute rules and practice, for a broker or warehouseman to be re-instated after disqualification, application had to be made by an Institute member. The disqualified concern itself had no standing. (b) Confronted by special cases where even the possibilities of the actual and supposed evils of which defendants complained, were so remote as to be virtually non-existent, defendants made no effort to devise a system for correcting abuses which would not involve serious injustice. (c) The requirement of a sudden election of but one of several activities disrupted substantial business set-ups of long standing. (d) Honest concerns were deliberately made to suffer with the dishonest. (O. 36.)

81. I find that it is reasonably certain that defendants could have secured adequate protection against secret concessions and fraudulent practices, through entirely practicable means far less drastic than compelling a separation of occupations; defendants made no real effort in this direction. Such less drastic means were readily available to defendants, would probably have proved no more dif-

ficult or expensive than the means actually adopted to compel separation of function, and even if they had, would not have taxed unduly the finances, efficiency or ingenuity of the Institute. Defendants' interest in preserving the price structure largely explains their preference for the procedure that they actually adopted. (O. 32, 37-40, 169-171.)

82. Defendants agreed upon the commissions to be paid brokers. There is no substantial evidence that the commissions agreed upon were not fair. The reason for adopting the agreement was to prevent a growing competition in bidding for brokers' services. Commissions did not vary prior to the Institute, probably because other inducements were then offered brokers by refiners, such as storing sugar with them. When such inducements were prohibited, competition in bidding for services if permitted, would naturally result in varying commissions. (O. 40.)

83. The refiners agreed that they would not deal with any broker or warehouseman who did not sign a contract according to a form recommended by the Institute. The Institute checked up on the several refiners and saw to it that this understanding was carried out. (O. 40.)

[fol. 346] 84. In essence, the warehouse agreement provided that if the warehouse company granted any rebate or concession, secret or otherwise, to any of its customers without granting the same rebate or concession to all, it should forfeit to the refiner employing it an amount equal to such rebate or concession. (O. 41-2.)

85. The brokers' agreement which had to be sworn to by the broker, prohibited concessions, secret or otherwise, by splitting commissions and imposed upon the broker generally an obligation to uphold the Institute's Code and the interpretations thereunder. (O. 41-2.)

86. In concertedly refusing to deal with any independent brokers, warehousemen, and customers, and then only except such brokers and warehousemen as signed the foregoing contracts, and in concertedly fixing brokers' commissions, defendants unduly and unreasonably restrained trade. (O. 168-175.)

The special relations which brokers and warehousemen occupy toward refiners do not justify the actions taken. (O. 175.)

[fol. 347] VII. Defendants' Activities Relating to Transportation

A. Code 3(c) and Delivered Prices

1. Pre-Institute Situation

87. The cost of transporting defendants' sugar from the several seaboard refining points to interior trade areas is a substantial element in the ultimate cost of sugar to purchasers. (O. 42.)

88. As the basis f. o. b. refinery price of the several refiners was usually the same or varied only slightly, individual refiners sold in areas beyond the territory in which their freight costs were as low as, or lower than those of all other refineries, by paying or absorbing part of the transportation charges. (O. 42.)

89. The freight applications of the refiners selling at a given point have always been the same at any given time, because any refiner who failed to meet a lower freight application, would for all practical purposes, lose the market. (O. 43.)

90. The extent to which the refiners sold in territory beyond that of their lowest actual freight costs varied, dependent principally on individual policy in the matter of absorptions. (O. 43.)

91. The custom was to quote sugar f. o. b. refinery, (O. 43.)

92. Prior to the formation of the Institute, refiners never refused customers the privilege of purchasing f. o. b. refinery, except in two areas: in these, refiners sold only on a delivered price basis:

(a) In Central Freight Association territory (the territory east of the Mississippi River, north of the Ohio River and west of a line from Buffalo to Pittsburgh) to which the freight rate from Baltimore was generally 1c per hundred pounds under Philadelphia, which was in turn 2c under New York, the Philadelphia rate was generally used and sales f. o. b. refinery denied. This practice was established long before the organization of the Institute.

(b) In territory to which the Texas refiners had lower rates than New Orleans, the freight applications were based upon the New Orleans rates, Texas refiners refusing to sell f. o. b. refinery. For many years the Texas refiners substantially lived on this freight pick-up. This practice had prevailed at least since 1917. (O. 43-4.)

93. The middle western and western beet sugar producers, who generally sold on a delivered price basis using the cane sugar refiners' freight applications, made a substantial profit on transportation, since their own actual freight rates were generally much lower than the lowest cane refiner's rate. This was a practice of long standing in the industry. (O. 44.)

[fol. 348] 94. The freight situation was complicated in certain markets which were served by differential routes, that is routes which were slower than the standard all-rail routes and involved all-water or a combination of water and rail transportation. The rates via these routes ranged up to 27c per 100 pounds cheaper than all-rail rates. A difference in cost of sugar of 5c or even less per 100 pounds is a substantial item. The most important of these routes served various areas around the Great Lakes and in the Mississippi Valley and tributary territory. (O. 44-6.)

95. Taking advantage of opportunities for cheap transportation, sugar merchants at interior points purchased large quantities f. o. b. refinery for shipment by the differential routes. Refiners, too, in shipping to consignment points used the differential routes extensively. (O. 46-7.)

96. Traditionally in the industry, the refiners' freight applications on sugar delivered at Great Lakes ports, regardless of how it actually moved, openly broke down during the season of open navigation to the Philadelphia lake and rail rate and during 1926 and 1927, the freight application on sugar sold in the Warrior River area (Alabama, Tennessee, Kentucky and parts of Indiana) had openly broken down to New Orleans barge rates, regardless of how it actually moved. The areas affected by these two breakdowns were of vital importance; in them, competition among the refiners was especially keen; the most important steps taken by the refiners in transportation mat-

ters during the Institute were addressed chiefly to preventing breakdowns in these areas. (O. 47.)

97. At the lake ports and in the Warrior River area, refiners from different points competed.

There was a tendency in these territories for freight applications for all sugar, regardless of how it actually moved, to be broken down to the level of the cheapest service carrying a substantial traffic. This tendency increased after the Institute was organized. (O. 47-8.)

98. Secret concessions were sometimes given by secret reduction of transportation charges, as of a cheaper differential rate though the sugar had not thus moved, or of a rate to another than the actual destination. With the elimination, after the Institute, of these and other secret concessions, the prior ostensible stability of the freight rate situation ended. Refiners were deprived of their former competitive devices. Probably as a result, competition developed in the freight applications themselves. (O. 44.)

2. The Post-Institute Situation

99. Pursuant to discussion at the pre-Institute organization meetings, defendants concertedly adopted and agreed to a rule not to charge differential rates on deliveries from consignment or otherwise than on direct shipments made over differential routes at customers' request and to charge customers all-rail freight applications on all deliveries made on refiners' account. This policy was expressed in Section 3(c) of the Code of Ethics, hereinafter referred to as Code 3(c). (O. 50-1, 176-7.)

[fol. 349] 100. Defendants' policy in this matter was amplified in the following Code interpretation:

"General Use of Differential Routes

Absorbing freight means the selling of transportation at less than cost, which is unsound in principle and necessarily throws an undue burden on the consumers at an- near the primary markets. It is realized, however, that the use of differential rates on consignments cannot be prevented in all markets at all times. The customer has the right to ship over differential routes from refinery points, taking the slower service at his own cost and risk of the market

during the transit period. If the quantity thus shipped is in fact inconsiderable, it should be ignored rather than break down the freight application actually paid on the preponderating quantity of sugar. If, however, sugar can be and is shipped by customers in this manner in sufficient quantity to break the market at the destination point and to render it difficult for refiners to sell their own sugar on the all-rail application, then the competition must necessarily be met. It is a question of fact in every instance, and the Executive Secretary should be fully advised, before sugar actually paying a higher rate is sold on the differential rate, of the necessity of this departure from the strict letter of the Code of Ethics." (O. 50.)

101. The total cost of ex-consignment deliveries is necessarily higher than the transportation charges to consignment points, because of warehouse and other charges, but the total of freight charges by differential routes plus these additional costs was frequently substantially less than all-rail rates. While varying in different localities, the estimated cost of consignment service was approximately 10c per 100 lb. bag. (O. 48-9.)

102. With the exception of Texas and Imperial, the refiners suffered net losses on freight absorptions, even without including the additional cost of consignment service, in each year of the period 1926-1931. C. & H. had a special arrangement with producers of the raws that it purchased, in effect to assume freight absorptions. Freight losses as shown by defendants, covering the entire country, reveal nothing with respect to particular trade areas. Freight pick-ups effected at some points or in some transactions at times offset absorptions elsewhere. The refiners effected substantial freight pick-ups at many points even in selling out of consignment stocks, when the selling price included the all-rail rate for sugar actually moved into consignment by differential routes. And even when they sold ex-consignment and charged for transportation at a differential rate, they at times effected pick-ups by actually shipping to the consignment point by a still cheaper differential route. When refiners shipped via differential routes and delivered direct to customers without a stopover at consignment warehouses, there were opportunities for a pick-

up by charging for transportation, as if sugar had moved via more expensive routes. (O. 49.)

103. Statistics on shipments over differential routes advised refiners whether or not market conditions in areas [fol. 350] served by differential routes really necessitated revising the current freight charge policy. The statistics were useful, whether refiners were acting independently or in concert, in establishing freight applications. Concealment of such data from the customers placed them at a disadvantage. With respect to this data as well as other statistics as described in Finding 65, defendants dealt unfairly with the trade. (O. 52.)

104. The discrimination between customers caused by absorptions in certain territories was only a claimed justification for Code 3(c). In seeking to put into effect the arbitrary freight rate for all deliveries on refiners' account regardless of the actual cost of transportation, defendants' real purpose was to further their own interests regardless of those of their customers, by preventing the breakdown of the freight structure. During the early months of the Institute, strenuous efforts were made by the Executive Secretary and those refiners that profited by the principle, to make it effective. But other refiners, chiefly Savannah, McCahan, and the Californians, lost business in certain territories as a result of adherence to the agreement. On several occasions, the Institute officials induced refiners to withdraw or refrain from announcing freight applications violating Code 3 (c) and the interpretation thereof. But by the summer of 1928, despite all preventive measures, it had been openly violated to some extent in the Warrior River and Great Lakes areas. It was clear by that time that because of the opposition of those refiners, the enforcement thereof must eventually meet with at least partial failure in these territories. But slight effort was made to enforce Code 3 (c) after the summer of 1928. It was abandoned at least by the fall of 1929 and probably much earlier. The code interpretation was finally rescinded in September, 1930. There is a substantial probability, however, that defendants may again attempt to make Code 3 (c) or a similar principle effective. (O. 51-2, 114-7, 120, 176.)

105. The refiners' transportation problems in the Great Lakes and Warrior River areas, those which Code 3 (c)

had been chiefly designed to solve, were finally solved by a system of delivered prices, with denial of the privilege of purchasing f. o. b. refinery. After discussion, deliberation and study by the defendants, begun in the spring of 1928, crystalization of sentiment therefor with important figures in the Institute, some definitely and some in practical effect advocating such a delivered price plan, and general agreement expressed at an Institute meeting as to the desirability thereof, such a system was introduced, (a) in a substantial and highly competitive territory in the Great Lakes area in April, 1929, and (b) in a substantial and highly competitive territory, the Warrior River area, in December, 1929. While the direct evidence is that there was no agreement in introducing the delivered prices, there is substantial evidence from which the inference may reasonably be drawn that the refiners acted, not independently, but concertedly and as a result of combination and conspiracy. If it were necessary, I should draw such inference. I deem it unnecessary, however, to make a finding thereon because even if delivered prices were not so adoptd originally, I find that defendants agreed to maintain and concertedly [fol. 351] maintained the system of delivered prices in both the Great Lakes and Warrior River areas. (O. 52-73.)

106. During the period of delivered prices, defendants concertedly maintained freight applications at figures in general substantially higher than the actual freight rates over differential routes carrying a substantial sugar traffic. But for the denial of the privilege of purchasing f. o. b. refinery, customers at many points could have transported sugar by differential routes for substantially less than the refiners' freight applications; and refiners did in fact transport sugar to such points for substantially less than their application. (O. 59, 63.)

107. In the fall of 1929, defendants acting concertedly through the Institute sought and obtained the assurance of the American off-shore selling agencies that they would adhere to, and conspired with them to adhere to, the delivered prices of the Institute members. The complete success of the delivered price system depended in fair measure upon such a combination with the off-shore interests because of the substantial competition that they offered defendants. (O. 63-7.)

108. From the time when delivered prices were first made effective, defendants intentionally created the impression in dealing with off-shore interests, with brokers, with Edgar and numerous sugar buyers in the Great Lakes and the Warrior River area, that the refiners had an understanding not to sell f. o. b. refinery, and that the Institute was responsible therefor. Numerous buyers in the Great Lakes and the Warrior River territories were denied the privilege of purchasing f. o. b. refinery and making shipments over cheaper differential routes, and were informed by responsible representatives of defendants that the denials were due to Institute rules and in effect to the refiners' understanding with one another that they would maintain delivered prices. Although there may have been nothing so formal as an Institute "rule" in this matter, these explanations were not mere excuses or alibis, but were in substance the genuine reasons for the refusal to make such sales. (O. 63-71; R. 6202 on p. 70 should be R. 620-2.)

109. Through the Institute defendants concertedly policed delivered prices and investigated alleged departures therefrom for the purpose of aiding in maintaining the delivered prices. (O. 68, 72.)

110. Delivered prices, as employed by defendants, caused virtually the same type of discrimination which defendants professed the desire to eliminate by Code 3(c). They caused discrimination against those customers who were charged the arbitrarily high delivered prices, as absorption caused a discrimination against those who were charged actual cost of transportation. (O. 71-2.)

111. The delivered prices concertedly maintained by defendants were patently unreasonable. (O. 177, 179).

[fol. 352] 112. Defendants concertedly sought to and for a time at least did maintain delivered prices in Texas as well as in the Great Lakes and Warrior River areas, when there were signs of a break-down. (O. 71 modified, 78).

113. Delivered prices were withdrawn in the Great Lakes area May 5, 1931, a little over a month after the bill in this suit was filed. They had broken down in the Warrior River area about the end of May, 1930. They eventually broke down, too, to a large extent in the C. F. A. territory and

completely in Texas. But just when this occurred is not clear. In November, 1931, American again announced delivered prices; all refiners followed except Arbuckle; accordingly the attempt failed. Regardless of the statement made by a broker representing one of the refiners that, on advice of counsel, defendants would not raise the 36.1¢ Chicago rate announced in May, 1931, to the 51¢ rate theretofore in effect, until after this case was over, I find that there is a strong probability that unless restrained, defendants, to solve their transportation problem, may again adopt delivered prices. (O. 73).

114. Defendants' adoption of Code 3.(c), their actions pursuant thereto, and their concerted maintenance of delivered prices constituted undue and unreasonable restraint of trade. (O. 177, 179.)

B. Institute "Information Service" in Transportation Matters

115. Announcements of changes in freight applications have been reported to and relayed by the Institute in a manner not materially different from announcements of price changes. (O. 74.)

116. In 1929, the Institute started a loose-leaf so-called "freight book." Later it supplied a copy to each refiner. The book is a digest of all selling terms and conditions of each refiner. (O. 74-5.)

117. The system of freight application announcements and the "freight book" were used by the Institute in aid of its efforts to make Code 3(c) effective. They were also a vital link in the Institute's activities to maintain the delivered prices. (O. 75, 179.)

118. "The freight book" was used in aid of the concerted activities with respect to transportation matters generally and contract terms. Individual refiners had accurate freight books of their own on which they depended. The Institute book filled no real need of the industry; at best it is a slight "convenience" and is unjustified. (O. 75, 106-108, 179.)

C. Miscellaneous Transportation Matters

1. Transiting and Diversion

119. Transiting and diversion privileges are granted to the shipper or consignee by the carriers, subject to rules [fol. 353] and conditions contained in tariffs filed with the Interstate Commerce Commission. (O. 76.)

120. Because of the artificiality in the freight applications charged by the several refiners both before and increasingly since the Institute, there were opportunities for using transiting and diversion privileges to get sugar to ultimate destination at a cost to the purchaser below that of the announced freight application of the refiner. (O. 77-8.)

121. Both before and since the Institute, diversion and transiting have been used by customers to defeat freight applications either by misrepresenting to the refiners the actual destination and then transiting or diverting the sugar, in effect practicing a fraud upon the refiner, or with the refiner's consent, either secretly as a screen for a secret concession or openly. (O. 78.)

122. Defendants adopted Code interpretations which contained detailed recommendations with respect to the action that individual refiners should take in making certain that no transiting diversion defeated the refiners' freight applications. While these recommendations, based on the collective experience of the industry, may have represented the most effective means for discovering frauds, they were designed to prevent and defendants agreed to prevent any transiting and diversion by customers even openly, when they would defeat freight applications. Defendants' agreement in this respect and actions pursuant thereto were essential to the success of their concerted efforts since the Institute to maintain artificial freight rate structures; they were for the purpose of aiding in maintaining such structures and constituted undue and unreasonable restraint of trade.

123. Concerted action was unnecessary to combat the fraudulent use of these privileges; individual refiners could have taken effective steps to make sure that frauds were not practiced upon them. The discrimination that resulted from their use, if they were used openly, was neither more

nor less vicious than the discrimination inherent in the artificiality of freight structures which the defendants either independently or in concert employed. (O. 78.)

124. Defendants' actions in their endeavor to have the railroads make certain changes in the transit tariffs were entirely fair and open. They were such as might normally be expected of any group of shippers desiring to obtain tariff changes. They provide no basis for a charge of undue or unreasonable restraint of trade. (O. 79-80.)

2. Water Carriers and Private Charters, and Other Transportation Services

125. Defendants concertedly sought and in the spring of 1930 obtained from transportation companies operating on the New York State Barge Canal, an agreement that they would carry sugar only on the basis of openly announced rates and terms from which they would not deviate without [fol. 354] open announcement. Defendants induced such action by the concerted threat of withholding business from carriers who did not openly announce their rates and terms. There is little evidence that the carriers indulged in the practice of secret rebating and, as justification for their action, defendants themselves rely upon "rumors" rather than actual knowledge that such practices were engaged in. I find that an important purpose of the defendants in seeking these agreements was to effect a stabilization of transportation rates. Defendants' conduct in this respect constituted undue and unreasonable restraint of trade. (O. 81.)

126. Recommendations of the Institute concertedly observed by the members provided that none of them should ship sugar on his own account by private charter except when such charter was arranged directly between refiner and carrier and refiner was satisfied that no broker, buyer, or warehouseman was participating in the rate, and that members should submit the terms of every such private charter to the Executive Secretary, so that he might scrutinize it for any indications of rebate or other violation of the Code of Ethics.

These recommendations went further than was necessary to accomplish the end of preventing secret rebating; the real aim was to assist in the preservation of the price structure. Defendants' conduct in this respect constituted undue and unreasonable restraint of trade. (O. 81-2.)

127. Minimum cargo was often as high as 2,000 bags and minimum carload usually 600 bags. Customers, unable to purchase in such large quantities, could by clubbing together, obtain cargo or carload rates. Acting under Institute recommendations, defendants agreed to refuse and concertedly refused to aid customers in making up the required minima by themselves participating in such pools with sugar shipped on their own account. Defendants' purpose was not, as claimed, to eliminate discrimination. Even if, due to refining schedules and sales requirements, refiners could not grant this privilege to all customers, there is nothing unfair in an apparent discrimination which results solely from the necessary limitations of a refiner's capacity in this respect. Defendants' conduct in this respect constituted undue and unreasonable restraint of trade. (O. 82.)

128. There was no effective agreement or understanding among the defendants to restrict the making up of mixed car lot shipments of sugar and syrup. (O. 82-83.)

129. Defendants agreed to use only trucking concerns not affiliated with any buyer, broker, or warehouse and then only under non-rebating contracts. Even though a warehouse trucking for its own customers may have been excepted from the operation of the agreement, the alleged justifications for the general policy and acts pursuant thereto, similar to those offered as to brokers and warehouses, are equally without merit. Defendants' conduct in this respect constituted undue and unreasonable restraint of trade. (O. 83.)

[fol. 355] 130. For a substantial period of time it was recommended in a Code interpretation and defendants agreed that members should adopt in all territories the practice of not absorbing switching charges on deliveries from consigned stocks to buyer's warehouse or spur, with certain exceptions. This provision remained in effect until May, 1931, after the bill in this suit was filed. Defendants' agreement was not adopted, as claimed, to prevent discrimination. While the absorption of switching charges increased the cost of consignment service, defendants could and did recoup themselves at some points for the expense of consignment by charging for transportation ex-consignment at a higher rate than they in fact paid in moving their

sugars. Defendants' conduct in this respect constituted undue and unreasonable restraint of trade. (O. 84.)

131. The evidence to support charges of concerted action (a) respecting freight applications on l. c. l. deliveries at some points and (b) restraining delivery service at some points from docks to the buyer's place of business concerns only a few incidents of minor importance, and I therefore make no findings with respect to them. (O. 84.)

VIII. Consignment Points

132. Prior to 1925, refiners maintained, each on its own account, stocks of sugar at a relatively few strategic points throughout the country, known as consignment points; from them, sugar was distributed locally and to the surrounding area in less than car lots, as well as in car lots, at the car lot rate.

During the period 1925-1927, refiners put stocks in at numerous points solely for the local trade. To hold their trade and to share in the advantage accruing to the first consignor, competitors followed the example and a substantial increase in the number of consignment points resulted.

While the Institute was unsuccessful in the attempt to bring about reductions in the total number of consignment points, defendants did agree and concertedly did eliminate consignments at many important points and did reduce the number thereof substantially in important areas. The Institute sought and obtained the co-operation of the Domestic Sugar Bureau and other non-members in eliminating and reducing consignments; without their cooperation, such elimination and reduction could not have been effected. In some states, the number increased, due to the failure of the refiners to effect an agreement with beet manufacturers or to agree on a program as to those states. (O. 84-5.)

133. The Institute recommendation of the usual specific re-consignment points was an intentional restriction to the points named and tended to prevent an increase. Apart from the Institute's general program with respect to warehouses, there was no restriction of warehouses for storage at reconsignment points. (O. 86.)

134. In recommending consignment points in the South, ports of entry like reconsignment points were separately

classified, and Wilmington, N. C., was eliminated. Limitation of ports of entry is more serious than elimination of [fol. 356] ordinary consignment points, insofar as it shuts a competitor out of a particular territory. (O. 86-7.)

135. Refiners' consignment service was valuable and beneficial to substantial elements in the trade. (O. 88-9, 1181.)

136. While the ex-consignment business of the small refiner, unable to finance as many stocks as his large competitor, was necessarily restricted, limitation of consignment points had some disadvantages for him. (O. 87.)

137. While the cost of increased consignment points might well be reflected in a higher general basis price, there is no assurance that the savings effected through some reductions thereof would be passed on to consumers generally. The result in either case is largely speculative. By shipping sugar to consignment over a differential route and charging for transportation on ex-consignment sales as if shipped over a higher rate route, defendants recouped themselves at times for the service. Refiners individually could, as they concertedly did, at one time, impose a service charge on consignment deliveries. (O. 87, 90.)

138. Communities eliminated as consignment points suffered as against neighboring ones because of the advantage thereby accruing to the latter points. (O. 89-90.)

139. The elimination of consignment points also eliminated from distributing agencies, one type of jobber, the "desk" jobber. (O. 90.)

140. In August and again in September, 1928, the Institute recommended a service charge on all l. c. l. deliveries ex-consignment. Soon thereafter, a 5¢ charge, agreed to by defendants, was put into effect by all members on l. c. l. deliveries ex-consignment. The charge was discontinued early in 1929. Agitation by some members for a renewal thereof in the fall of 1930, was unsuccessful. (O. 90.)

141. Defendants' concerted conduct with respect to elimination and reduction of consignment points, reconsignment points and ports of entry, and with respect to imposing a service charge on l. c. l. deliveries ex-consignment, unduly and unreasonably restrained trade. (O. 181.)

IX. Activities Relating to Miscellaneous Contract Terms and Conditions

A. Long Term Contracts

142. Before the World War, 30 days contracts, that is, contracts calling for delivery within thirty days, were customary for all except manufacturers who were granted 60 days. While there was no definite practice after the war, [fol. 357] long term contracts were frequent. During the immediate pre-Institute period, the California refiners generally granted contracts for a term longer than thirty days to the Pacific Coast canners, and Revere to any of its customers in a position to use them. Contracts calling on their face for delivery over a period in excess of 30 days, were entered into during the immediate pre-Institute period, by a number of refiners with merchandisers of sugar, chain stores and manufacturers. This last class had readily obtained them at all times prior to the Institute. The terms and conditions of the various contracts differed. Furthermore, the practice was widespread to contract for thirty day delivery although both parties then knew that the refiner would, as he did, extend the time to 40, 50, or 60 days.

While some long term contracts, other than Revere's and the Californians', may have been secretly arranged with favored buyers and may have carried discriminatory concessions, it was practically necessary that many entirely fair long term contracts should be made on the basis of private negotiations, because their terms were necessarily somewhat complicated and would depend upon the needs and situation of the particular refiner and customer. Prior to the Institute, long term contracts were privately negotiated by "ethical" as well as "unethical" refiners. (O. 91-92.)

143. Such contracts have a real economic value to refiner and to consumer. Some of them tend to bring about greater evenness of production through the year, thus effectuating economies for the refiner; they enable manufacturers promptly to know the cost of this element of their finished product. (O. 99-100.)

144. At the organization meetings in December, 1927, the refiners agreed not to enter contracts calling for deliveries in excess of 30 days while the arrangements for

setting up the Institute machinery were being completed. At a Directors' meeting in February, 1928, this agreement was formally continued. Efforts were also made by the Institute to induce Hershey to join defendants in this policy. Defendants' agreement not to enter long term contracts and their concerted refusal to enter such contracts has continued without substantial change. Canners in three Pacific Coast states have always been granted long term contracts as an exception to the agreement. (92a-93.)

145. On November 1, 1928, the directors approved a contract calling for deliveries up to sixty days after the usual contract period, for certain sales of sugar. This was never put into effect by defendants because of a realization that the proposed contract would be unacceptable to the trade. Customers' endeavors since the Institute to obtain longer than 30 day contracts from defendants have been unsuccessful. (O. 93.)

146. Whether or not a refiner, by long term contracts could more readily conceal special arbitrary concessions, is at best speculative; the Institute had ample facilities to prevent any such secret discriminations without prohibiting long term contracts. (O. 95.)

[fol. 358] 147. There is no substantial evidence that manufacturers who bought sugar from the refiners had sold or were likely to sell such sugar. (O. 95.)

148. I find that concerted action, whether in prohibiting all long term contracts or only in insisting on open announcement in advance of entering any such contract that may be offered, is without justification. (O. 95.)

149. An obligation to arhere to such open announcement would tend to prevent many entirely fair contracts. While the abolition of long term contracts was effected largely through defendants' definite agreement, the requirement that prices and terms must be openly announced in advance of sale aided in the elimination, because many long period contracts would necessarily have to be arranged by private negotiations. (O. 95.)

150. As the requirement of announcement of all contract terms in advance of sales would make many long time contracts practically impossible, the purpose of insistence

thereon must be and is deemed to be the prevention of such contracts. (O. 95.)

151. In prohibiting long term contracts, defendants were not interested in preventing unfair discriminations between customers. Their purposes were to preclude the mere possibility of secret concessions and more important, to preserve the price structure. In their agreement and action pursuant thereto, they have entirely disregarded the interests of their customers. (O. 95.)

152. Because shortly before or during the December, 1927, Institute organization meetings, long term contracts were negotiated between Edgar and Godchaux and between Edgar and Revere; the Institute sought and obtained from Edgar an assurance that he would maintain refiners' prices and not take advantage of the opportunity afforded by these contracts to cut prices. At least during most of the period of these contracts, Edgar did maintain prices pursuant to his agreement to do so. (O. 95-6.)

153. By the terms of his agreement with the Institute, Edgar was deprived of the competitive advantage of cutting prices and the consuming trade was kept from participating in the benefits of lower prices. His contracts threatened the Institute project only insofar as the Insti- [fol. 359] tute was concerned with uniformity of price structure. Defendants' purpose in obtaining the agreement from Edgar was to preserve that structure. (O. 96.)

154. Defendants were without justification in acting concertedly to determine whether and to what extent to relax the rigid enforcement of the 30-day contract. (O. 26, 96-7.)

155. The elimination of long term contracts, the Edgar price maintenance agreement and the concerted action with respect to enforcement of the 30-day contracts constituted undue and unreasonable restraint of trade. (O. 181.)

B. Quantity and Other Discounts

156. Prior to the Institute there was no systematic practice of giving quantity or other (O. 98 modified) discounts. The majority of discounts were given to the large buyer. But discounts were often granted to the smaller buyer as well, and the amount of the discount bore little relation

to the amount of the purchases or the method of taking delivery. This was the natural result of the pre-Institute secret concession system. The "ethical" refiners, except in the case of the Revere long term contract, apparently gave nothing which might be deemed a special (O. 98 modified) discount. (O. 98.)

157. Defendants entered into an agreement not to grant and concertedly refused to grant quantity discounts. (O. 97.)

158. The agreement and the practice pursuant thereto prohibited not only unsystematic and secret quantity discounts, but also discounts systematically graded according to quantity. (O. 98.)

159. Although the language of the Code provision prohibiting quantity discounts did not expressly condemn discounts for sales with the type of deliveries which would result in savings to the refiner, in fact the refiners agreed not to grant and concertedly refused to grant such discounts. (O. 102.)

160. On the question of direct costs as related to quantity and other discounts: (a) The refiners get no discount for quantity purchases of raws which constitute about 80% of the cost of refined. (b) Quantity sales effect no appreciable direct savings in manufacturing costs. (c) Quantity sales effect no savings in brokerage. (d) But in sales to those manufacturers and distributors that can take deliveries of their sugar in carload lots direct from the refinery, as many prefer instead of ex-consignment, there are substantial savings in delivery, storage, bookkeeping, and other incidental expenses. Large purchasers other than chain stores were more likely to take deliveries in this way than small purchasers. It appears, however, that no such savings [fol. 360] would be effected in large sales to chain stores because the large sales in such cases usually amount, in effect, in view of the method of taking delivery, to a series of small sales to the individual stores in the chain. Sugar buyers were refused discounts for taking direct carload rather than ex-consignment deliveries, because if the understanding among the refiners that no special discounts of any kind should be allowed, regardless of the economic justification therefor. (O. 98-99, 102.)

161. On the question of indirect costs as related to quantity and other discounts, I find (a) that sales which distribute production more evenly through the year, as some long term contracts did, effect substantial savings to the refiners. (b) That the demand for sugar is elastic: that encouragement of large sales through quantity discounts may reasonably be expected to tend in the long run to build up total production and thereby effect economies for the refiners. (O. 99-101; "1921" on O. 100 should be "1931".)

162. A quantity discount to those wholesalers selling to manufacturers as well as to manufacturers buying directly from the refiner, may well result in a substantial increase in sugar consumption. (O. 100-101.)

163. Defendants did not regard the demand as inelastic. In four years they spent through the Institute about one and three-quarters million dollars for advertising; they advertised ice-cream, cereals, and various other things with which sugar would be consumed. (O. 101.)

164. At least in many cases, a discount based solely on quantity would have been justified even under defendants' economic theory. (O. 101.)

165. Defendants prohibited quantity and other discounts in order to preserve the uniformity of price structure and in order to provide absolute assurance that refiners should not cloak secret, arbitrary concessions in the form of a special practice. Defendants preferred to have all sugar sold in any given trade area at precisely the same price and terms rather than to effect economies in its sale and distribution. In prohibiting all quantity and other discounts resulting in economies to the refiner, defendants unduly and unreasonably restrained trade. (O. 101, 181.)

C. Tolling

166. Under the tolling arrangement, the refiner accepted raw sugar from its owner and gave him refined; not his own sugar but an equivalent quantity, usually 93 pounds for each 100 pounds of raw, the 7 pounds difference representing the loss in refining. A charge was made for the refining service. The refiner's benefit from tolling was in not having to finance the raw sugar. (O. 103.)

167. Pre-Institute tolling agreements were made by the refiners with one another, with producers of raws, with manufacturers of products containing sugar, and with sugar merchants; they were not common, however, and were [fol. 361] always a matter of special arrangement. (O. 103.)

168. Some agreement on the subject was effect- by defendants during the preliminary organization meetings in December, 1927, but whether to toll for no sugar customer or to except from the ban manufacturers of products containing sugar, is not clear. (O. 103.)

169. After a tolling contract made by a refiner with a manufacturer in July, 1928, was condemned by the Institute as a Code violation, defendants agreed not to make and concertedly refused to make tolling contracts for any purchasers of refined sugar. They further agreed not to toll and concertedly refused to toll for raw producers, except after exacting an agreement from such producers to sell the tolled sugar in accordance with the Code. (O. 103.)

170. Defendants' dominant purpose in prohibiting and regulating tolling was not as claimed, to prevent unfair discrimination but to prevent sales of sugar at prices, terms and conditions which would jeopardize the price structure. (O. 104.)

171. Defendants' restraints on tolling were undue and unreasonable. (O. 181.)

D. Credit Terms

1. Four Payment Plan

172. In 1928, the four payment plan was offered in three southern states. In November, 1929, and again in December, 1930, it was extended to other southern states or to parts of them. After a trial, it was withdrawn in some sections. Since the filing of the Government's petition herein, it has been gradually extended through the entire country, with the exception of the eleven Western states. (O. 104-5.)

173. Defendants concertedly and by agreement substantially and effectively limited the areas in which the plan was offered and the extension thereof, until the filing of

this suit. They did not confine their activities to open announcement of the four payment plan. (O. 106-110.)

174. The restraints imposed by defendants on the four payment plan were undue and unreasonable. (O. 181.)

2. Split Billing

175. Split billing was originated by the California refiners in the middle western territory because of the disadvantages resulting from the difference between the 80,000 lb. carload minimum prescribed by the railroad tariffs on shipments from the Pacific coast and the 60,000 lb. mimimum from the Atlantic Coast and Gulf points. To overcome this, Pacific Coast refiners made two billings to buyers in competitive territory, the first for 60,000 lbs., pavable within seven days after arrival, and the second for the balance, payable within fourteen days after arrival. Elsewhere, split billing, while not commonly practiced, was occasionally used by some refiners as a form of secret concession. (O. 110.)

[fol. 362] 176. While originally developed to offset differences in carload minima, the practice could be and was at times applied as a competitive device to meet other forms of competition, but was suppressed through the Institute action. I find that there is no evil in split billing, except to the extent that, prior to the Institute it may have been used to give secret concession. This, however, could have been prevented without prohibiting the practice itself. (O. 111-113.)

177. Defendants concertedly prevented, limited and suppressed the extension of the practice in substantial areas and thereby imposed undue and unreasonable restraints of trade. (O. 111-113; 181.)

178. Although the Four Payment Plan has been effective since February 10, 1932, in all states where split billing was formerly practiced, and there may therefore no longer be need for split billing, the extension of the Four Payment Plan occurred subsequent to the filing of the present suit, and there is a substantial probability of further concerted action in respect to a split billing unless restrained. (O. 113.)

3. The Cash Discount.

179. The cash discount had always been 2%. It was taken for granted among the defendants that this rate would be continued. During the post-Institute period, a 3% discount was effective, for not more than ten days. There is no substantial evidence of concerted action with respect to the withdrawal. But recommendations and letters by the Institute had some effect in keeping the discount stabilized at 2%. The post-Institute elimination of secret concessions tended to cause competition to manifest itself by other means; the steps taken to preserve the 2% discount were designed to prevent competition in this respect. (O. 113-4.)

180. Traditionally bills were payable with discount seven days after arrival by rail or seven days after withdrawal from consignment, with three days of grace; in all, ten days had practically become the custom of the trade. This has in fact been continuously allowed with respect to such deliveries. (O. 114.)

181. Early in 1928, when keen competition manifested itself in regard to the extent of the discount period on shipments by differential routes in common [illegible]ry reached by Eastern and New Orleans refiners, de[illegible]ndants concertedly attempted to restrain such competition, in part successfully, for the purpose (a) of equalizing their own opportunities, (b) of discouraging shipments over differential routes and (c) of preventing a breakdown in the high freight applications which they aimed to maintain. So-called "uniform definitions" which they adopted were, in substantial measure, a part and in aid of such concerted activities. As a result of defendants' activities with respect to these matters, which continued at least until delivered prices were put into effect, more liberal payment terms were suppressed. Even if defendants have not restrained such competition since the break-down of the freight structure after this suit was brought, there is a substantial probability that unless restrained they will again engage in similar activities. (O. 117-8.)

[fol. 363] 182. The restraints described in findings 179 and 181 are undue and unreasonable. (O. 117, 181.)

E. The Price Guarantee

183. Prior to the Institute refiners offered in some localities a guarantee against price decline between the day of entering the contract and that of delivery. At about the time the Institute was organized, the Eastern and Southern refiners withdrew the guarantee. While this withdrawal was not the result of concerted action, soon thereafter defendants did act concertedly, (a) in seeking to prevent a revival thereof, and (b) in restricting the guarantee as to the routes of shipments and the territories where it should apply, when it was partially revived. (O. 118, 121.)

184. During the early months of the Institute, concerted but unsuccessful efforts were made to induce C & H., which had never discontinued the guarantee contracts, to withdraw them. Thereupon the Eastern and Southern refiners re-instated them but only to the extent necessary to meet C & H competition. (O. 119-121.)

185. The Eastern and Southern refiners' disapproval of the guarantee was not based, as claimed, on alleged discriminations caused thereby. (O. 121.)

186. Defendants' restraints on the guarantee were undue and unreasonable. (O. 181.)

F. Containers and Used Bags

187. Subsequent to 1923, a limited practice was developed by some refiners and beet manufacturers of making an allowance to certain customers for the return of refiners' used bags or for the customer supplying and re-using his own bags. By these methods, the customer could save from 5-10¢ more for each bag of sugar purchased than by a secondhand sale of such bags. The saving to the customer constituted a substantial sum and could be effected without substantial expense to the refiner. (O. 123.)

188. Pursuant to agreement reached in the second month of the Institute, defendants concertedly discontinued and prohibited the making of allowances to customers for returning used bags or for using customers' own bags and they have since concertedly refused requests for such allowances; defendants have also concertedly discouraged experimenting with new types of containers, such as bulk con-

tainers. In so doing, defendants deliberately disregarded the public's interest in the development of more economical methods in the distribution of sugar. The practice of making a bag allowance promised substantial economies in sugar distribution; defendants' actions suppressed it in its experimental stage. In enforcing the agreement against bag allowances, the Institute has cooperated with the Domestic Sugar Bureau. (O. 122-4, 126.)

189. Defendants' real objection to granting used bag allowances was not, as they claimed, that such allowances would necessarily be discriminatory, but that they might conceivably be made a cloak for secret concessions. The practice of making used bag allowances had not been used [fol. 364] as a cloak for secret concessions. Defendants could readily have given bag allowances without unfair discrimination between customers. (O. 125-6.)

190. Defendants' activities with regard to bags and containers constitute undue and unreasonable restraints of trade. (O. 181.)

G. Private Brands

191. Prior to the Institute, some of the refiners packed sugar under private brand names for various customers. Defendants in substance agreed that private brand business was not to be generally accepted, and as a result thereof, individual refiners refused such business; further, that they would accept such business in no event without first reporting it to their competitors. Such reports were in fact made; the purpose thereof was to afford opportunity for applying concerted pressure against acceptances. (O. 126-8.)

192. Defendants have not shown that private brands could not have been used for all customers desiring them. Private brands are neither more nor less deceptive than the refiners' own brand names. There is no substantial evidence that packing private brands entails substantial expense to refiners. If it would entail such expense, there is no reason why individual refiners might not make a service charge. I find the restraints defendants imposed on private brands were undue and unreasonable. (O. 128-9, 181.)

H. Second-Hand Sugar or Resales

193. Second-Hand sales or resales are always made at a differential below refiner's prices because customers prefer, on equal terms, to buy direct from the refiner. Because of this differential, they affect defendants' first-hand sales adversely. (O. 129.)

194. Prior to the Institute, refiners at times used an ostensible resale transaction to cloak what was in fact a secret concession. (O. 129.)

195. Defendants concertedly adopted rules: (a) prohibiting refiners from making resales either open or secret; (b) requiring resale invoices to go to original buyer; (c) prohibiting recognition of customers' resales of unwithdrawn sugar after contract due date; (d) limiting customers' privilege of changing specifications and destination after the contract due date even where the refiner was responsible for the delay in withdrawal; (e) requiring buyers to elect and specify at the time of entering contract, without privilege of change, the prices and or terms in cases where the refiner had more than one price or difficult terms in different or the same territories; and (f) imposing a penalty upon brokers who charged brokerage on resales at a rate lower than the usual commissions on first hand sales, but the attempt to impose a penalty was abandoned in May, 1931, after the present suit was brought. (O. 130-4.)

[fol. 365] 196. With respect to the agreement requiring sugar to be invoiced to the original buyer, the purpose whereof was to have the bookkeeping entries accurately portray the transaction as it was, if it were a bona fide resale and not in fact a concealed secret concession, I find that this involves no substantial restraint. In other respects, defendants' rules go much further than was reasonably necessary to prevent fictitious resales and impose substantial restraints upon legitimate resales. I find no justification for the restraints of all resales by refiners; for the restraints upon recognition of resales after contract due date and upon the freedom to vary prices and terms where the refiner had differing prices and terms, or for the penalty upon brokers; in these respects defendants imposed undue and unreasonable restraints of trade. (O. 130-4.)

I. Damaged Sugar and Frozen Stocks

197. Defendants concertedly adopted and agreed to Code provisions, which, while recognizing the propriety of selling damaged sugar and frozen stocks at a concession, required that prior notice of such sales should be sent to the Executive Secretary. Failure of the members scrupulously to observe the Code requirement in this respect may have lessened the effects of the Institute's policy but did not nullify it. The Code provisions have remained in force and as late as February 1931, the Executive Vice-Secretary of the Institute advised a refiner in very definite terms that members were expected to observe these Code recommendations. Various refiners including American so understood the matter and notified the Institute before sales of damaged sugar and frozen stocks. (O. 135-7.)

198. Notice after rather than before such sales would serve the purpose of informing the Institute as to the facts, so that it would be able to meet charges from members or others, of arbitrary concessions by refiners. The notice before sale did enable interference with legitimate sales and was sought and used by the Institute not only to meet charges of arbitrary concessions, but to restrict and control such sales and thus to prevent market disturbances and to preserve the price structure. (O. 137.)

199. Defendants also agreed, without substantial justification, that frozen stocks and damaged sugar should not be applied to any contracts not originally calling for them; and that damaged sugar or frozen stocks should not be sold except in spot transactions. (O. 139-140.)

200. The restraints that defendants imposed on sales of damaged sugar and frozen stocks were undue and unreasonable. (O. 181.)

[fol. 366] X. Alleged Agreement on Basis Prices and General Effect on Institute on Price Levels

201. I find no agreement among defendants on basis prices in the sense of an agreement to adopt a certain basis price from time to time and to maintain it during any period. Frequently an announcement by one refiner of an advance would result in a series of announcements by others, ultimately leading to a decline. Often, too, the advance would be withdrawn because one refiner would

refrain from following the announcement. Except in few instances, a decline announcement was followed by all. (O. 31 m. 8, 140-1, 141.)

202. The number of price changes for refined as compared to raw sugar has been relatively less since the Institute than before. The cost of raw is about 80% of the cost of refined. I find that the post-Institute decrease in the percentage of refined to raw price changes, despite a pre-Institute tendency in this direction, is too marked to be explained by the drop in raw prices. Expert buyers who, regardless of whether they could be certain of a definite period of grace on each move, studied market conditions carefully in order to determine the opportune time for buying, found a lack of sensitivity in refined to raw prices in the post-Institute period. In the post as compared to the pre-Institute period there was a marked increase in margin and a substantial increase in profits despite a concededly large excess capacity. (O. 144-145.)

203. I find that in the post-Institute period such higher level for the price of refined as compared to that of raws has been maintained, as to negate the prevalence of free competition. (O. 145.)

204. Factors largely responsible for this relative stability of prices and for the maintenance of price levels regardless of supply and demand, observable since the Institute, are:

First, collecting and disseminating among the refiners while withholding in large part from buyers, the statistical information. This tends at least to stabilize conditions in the industry and aids the individual sellers in their effort to maintain high prices.

Second, the steps taken by the defendants to maintain the uniformity of price structure and thus to eliminate the possibilities of price variations to distributors or ultimate purchasers at any given time and thereby to deprive them of the opportunity, by underselling, to disturb the price structure.

Third, the stabilizing effects of the friendly cooperative spirit which the Institute brought to the industry.

Fourth, the assurance which the open price system under the Institute gave to each refiner that the only prices, terms and conditions he need meet were those openly announced in advance of sales by his competitors. (O. 146-147.)

[fol. 367] 205. A basis price agreement was not vital to defendants' common purpose to maintain relatively high price levels; in part at least they were able to and did maintain relatively high prices, through preserving the uniform price structure, withholding statistics from the trade and effectuating the open price scheme. (O. 147a.)

XI. Miscellaneous Activities

1. Fines and "Trials"

206. A resolution embodying a system of fines to be imposed upon members for violations of the Code, was adopted by the directors in June, 1930, but no fine seems ever to have been imposed and in January, 1931, the resolution was formally rescinded. While most of the refiners assented to the plan and Institute officials as well as some refiners deemed it operative, two of them did not assent thereto and some of them believed that it never became operative. Defendants' confusion in this matter was genuine. I deem defendants' attempt to devise a system of fines abortive and of no importance. (O. 148-9.)

207. I find that the provision in the General Rule of Procedure for the Executive Committee authorizing that Committee to levy assessments for Institute operating expenses from time to time as needed, relates solely to levies for operating expenses and not to fines. (O. 149.)

208. In the fall of 1930, some steps were taken to devise a plan for penalizing members at the rate of 10¢ per undelivered bag, for failure to compel buyers to take delivery within the contract period. But no such plan appears to have been formulated. (O. 149.)

209. The Institute from time to time examined the several refiners' records and files in investigating suspected code violations and held more or less formal trials of refiners in order to determine whether there had been code violations. These activities, insofar as they were in aid of defendants' other illegal activities, are likewise undue and unreasonable restraints of trade. (O. 149.)

2. Allocation of Production and Territory

210. After the Institute organization meetings, at which the question of allocating production was discussed and defendants were advised by counsel that this was an improper subject for concerted action, the matter was dropped and never again discussed or considered. While certain statistics later collected and exchanged by defendants would have provided all figures necessary for such allocation, I find that no such allocation was effected or even attempted. (O. 150-151.)

211. Whether Western was persuaded to withdraw from competition in Indiana, Ohio, Kentucky and Tennessee through efforts of other refiners, I find it unnecessary to determine on the conflicting evidence, because of the unimportance of this matter which occurred during the first year of the Institute and was not followed by any similar incidents. (O. 151-152.)

212. I find that defendants neither considered nor made any general allocation of territory and that there is no substantial basis for a fear that defendants are likely to concern themselves with such matters. While certain refiners and offshore interests suffered territorially as a result of defendants' activities with respect to code 3(c) and other matters, I find that any such territorial restraints [fol. 368] were merely incidental to such activities and will doubtless end with their cessation. (O. 151-152.)

3. Blacklisting of Customers

213. Under Institute practice, a customer who fails to complete his contract according to its legal effect and who is on that account denied credit by the refiner, is reported to the Institute. His name, but not that of the refiner reporting him, is then circulated to the members. I find no undue or unreasonable restraint of trade in any agreement so to report or to circulate such fact. I further find that there was no general understanding or agreement among defendants to blacklist customers so reported. (O. 152-5.)

4. Raw Sugar Polarization Allowances

214. Because the sucrose content of any lot of raw sugar is undetermined until the polarization test, there must be

some scale of allowances accepted by both parties, upon the basis of which adjustments in the contract price may be made. This cannot practicably be negotiated for each contract; there must be some generally accepted scale of allowances. (O. 155.)

215. I find that the scale of allowances prevailing prior to 1928 for raw sugar above 96° was unfairly high, that the new arrangement to which defendants and raw sugar interests agreed in 1928 was scientific and entirely fair, that any lack of representation of raw interests in the negotiations leading to the agreement was due to inadvertence and in any event was unimportant, that scales of allowances similarly negotiated and agreed to were customary and practically necessary. Defendants' actions with respect to raw sugar polarization allowances do not constitute undue or unreasonable restraint of trade. The special circumstances justify the action taken. (O. 156.)

XII. Definitions and Continuance of Restraints

216. All of the concerted activities and restraints referred to in each of the above findings, except as otherwise limited, constitute parts of a general scheme, combination, agreement and conspiracy to suppress competition, maintain relatively high prices of refined sugar, as compared with the contemporary prices of raws, increase the refiner's margin and profits at the cost of distributors and the consumers, and unreasonably restrain trade and commerce among the several states and in the District of Columbia.

217. All of the concerted activities and restraints referred to in each of the above findings have continued at least through the end of the trial of this case unless otherwise limited in the specific findings.

218. The terms trade or commerce in these findings, unless otherwise stated, refer to interstate trade and commerce in refined sugar. The terms competition, concerted action, and restraints refer respectively to competition, concerted action and restraints in such trade and commerce.

[fol. 369] Conclusions of Law

From the foregoing Findings of Fact, the Court reaches the following conclusions of law:

A. In the manner and in the particulars described in the foregoing Findings, defendants have engaged in a combination and conspiracy, which has unduly and unreasonably restrained trade and commerce in sugar among the several states and in the District of Columbia, in violation of the Act of July 2, 1890, commonly known as the Sherman Anti-Trust Act.

B. Each of the following agreements and concerted activities, on the part of the defendants, as described in the foregoing Findings, unduly and unreasonably restrains such trade and commerce in violation of such Act:

1. The agreement not to discriminate between customers, as described in finding 37; (O. 158-160.)

2. The agreement openly to announce prices, terms, conditions and freight applications in advance of sales, to adhere thereto until open announcement, in advance of sales, of changes therein, the activities pursuant to such agreement, and the system of reporting and relaying current and future prices, terms, conditions and freight application in aid and as a part of such agreement and activities; (O. 160-163, 179.)

3. The original restraints upon all repricing of contracts, and the subsequent restraints upon repricing of contracts entered prior to the day of announcement of a price decline; (O. 163.)

4. The collection and dissemination by and among defendants of statistical information regarding melt, deliveries, stocks on hand, stocks on consignment, stocks in transit, and the volume of sugar moved by differential routes, without making such information available to the purchasing trades; (O. 163-167.)

5. The requirements imposed and persuasion exerted upon non-members and third parties generally in aid and as a part of restraints herein held illegal; (O. scatter throughout.)

6. The action by defendants to meet, suppress, or restrain contract terms and conditions and freight applications of particular refiners and distributors, in aid and as a part of restraints herein held illegal; (O. scattered throughout.)

7. The requirements imposed upon brokers, warehousemen, customers and trucking concerns to elect one of such functions to the exclusion of others and to cease certain [fol. 370] lines of business, and the refusal and threats of refusal to deal with those who do not comply. (O. 168-175, 180.)

8. The system of exacting pledges and uniform contracts from brokers and refusing to deal with brokers who do not comply, in aid and as a part of restraints herein held illegal; (O. 176.)

9. The system of exacting non-rebating agreements from brokers, warehousemen and trucking concerns and refusing to deal with those who do not comply: (O. 176, 180.)

10. The maintenance and circulation of lists of warehouses, brokers, and trucking concerns, employed or to be employed by refiners, in aid and as a part of restraints herein held illegal; (O. 34.)

11. The imposition of penalties and forfeitures on brokers and warehousemen in aid and as a part of restraints herein held illegal; (O. 130-133, 176.)

12. The fixing of brokerage commissions; (O. 175-176.)

13. The agreements on transportation charges and freight applications, including Code 3 (c), and the activities pursuant and supplementary thereto; (O. 176-177.)

14. The maintenance of delivered prices and the refusal to sell f. o. b. refinery; (O. 177-179.)

15. The maintenance and dissemination of the "freight book", the digest of freight applications, selling terms and conditions prevailing among the several refiners in different territories, and the information service relating thereto; (O. 179.)

16. The restraints on transiting and diversions; (O. 180.)

17. Inducing water carriers to agree to carry sugar only on rates and terms openly announced in advance and not to deviate therefrom without like announcement and threatening not to deal with water carriers which do not comply; (O. 180.)

18. The restraints on refiners' private charters; (O. 82, 180-181.)

19. The restraints on refiners' participation with customers in pool-car and pool-cargo shipments; (O. 82, 180-181.)

20. The fixing of switching charges on deliveries from consigned stocks to buyer's warehouse or broker and the restraints upon the absorption thereof; (O. 83-84, 180-181.)

[fol. 371] 21. The elimination, reduction, and restriction of consignment points, reconsignment points, and storage at ports of entry; (O. 181.)

22. The imposition of a service charge on all less than carload deliveries ex-consignment; (O. 181.)

23. The restraints on long term contracts; (O. 181.)

24. The activities in determining whether and to what extent to relax contract terms and the use of statistics of undelivered contract balances in aid and as a part of such activities; (O. 26, 181.)

25. The restraints on quantity and other discounts which reflect, effect or result in economies to refiners in direct or indirect costs; (O. 181.)

26. The restraints on tolling for customers; (O. 103, 181.)

27. The restraints on tolling for others than customers, in aid and as a part of restraints herein held illegal; (O. 103, 181.)

28. The restraints on the four-payment plan; (O. 181.)

29. The restraints on split billing; (O. 181.)

30. The restraints on cash discounts; (O. 181.)

31. The restraints on price guarantees; (O. 181.)

32. The restraints on allowances on used bags or customers' bags and on experiments with new types of containers; (O. 181.)

33. The restraints on packing of private brands; (O. 181.)

34. The restraints, with the exception of the requirement that invoices go to original buyers, on resales or sales of second-hand sugar; (O. 131, 181.)

35. The restraints on sales of damaged sugar and frozen stocks; (O. 181.)

36. The Edgar price maintenance agreement; (O. 96, 181.)

37. The requirement that buyers elect between the guarantee form and the non-guarantee form of contract at the time of entering the contract, and the denial to buyers of the privilege of changing from one form of contract or from one destination to another by resale or otherwise; (O. 131-132.)

[fol. 372] 38. The Institute's policing activities, its investigations of suspected code violations, its examination of refiners' files and records, and its trials of refiners and their agents, in aid and as a part of restraints herein held illegal. (O. 72, 149.)

C. Defendants' concerted activities resulting in the adoption of a master tariff and in an improved scale of raw sugar polarization allowances, were fair, reasonable, and justified by the circumstances described in the Findings, and should not be restrained. (O. 80, 157, 180.)

D. As the Institute, divorced from its illegalities, has fulfilled and may fulfill some lawful purposes, it need not be dissolved. (O. 182-193.)

E. There is a strong and immediate probability that each of the defendants, except W. W. Harper and Edgar H. Stone, will continue to engage in the activities herein declared illegal, and each of such defendants should be restrained from further engaging in such activities or similar activities October 9th, 1934. (O. 183-184.)

Julian W. Mack, United States Circuit Judge

[fols. 373 & 374] IN UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

Equity. 59-103

UNITED STATES OF AMERICA, Plaintiff,

vs.

THE SUGAR INSTITUTE INC., THE AMERICAN SUGAR REFINING COMPANY, Margaret A. Jamison and Martha A. Jamison, Doing Business Under the Firm Name and Style of Arbuckle Bros., California & Hawaiian Sugar Refining Corporation, Ltd., Colonial Sugars Co., The Cuban-American Sugar Co., Godchaux Sugars, Inc., William Henderson, Hunt Henderson, Chris. Gambel and Fred Gambel, Doing Business Under the Firm Name and Style of Henderson Sugar Refinery, Imperial Sugar Co., W. J. McCahan Sugar Refining & Molasses Co., The National Sugar Refining Co. of New Jersey, Pennsylvania Sugar Co., Revere Sugar Refinery, Savannah Sugar Refining Corp., Spreckels Sugar Corp., Texas Sugar Refining Corp., J. D. and A. B. Spreckels Securities Co., (Doing Business Under the Trade Name of Western Sugar Refinery), J. F. Abbott, Earl D. Babst, W. Edward Foster, J. P. Cody, M. E. Goetzinger, George M. Rolph, William B. Tyler, C. B. Newman, George E. Keiser, Jacob Moog, I. H. Kempner, Harry G. Thompson, Louis V. Place, Manuel E. Rionda, James H. Post, Charles D. Bruyn, William H. Hoodless, Henry E. Worcester, Benjamin O. Sprague, Thomas Oxnard, Rudolph Spreckels, W. W. Harper, Edgar H. Stone, Alexander Smith, H. B. Moore, Frank E. Sullivan and Fred G. Taylor, Defendants

[fol. 375] FINAL DECREE

This cause having come on for final hearing upon the petition, filed March 30, 1931, as amended, and upon the several answers thereto, and the issues thereby presented having been duly tried before the undersigned, Julian W. Mack, United States Circuit Judge, and having been argued and the Court having duly rendered and filed its opinion herein, and having this day duly made and entered special

Find-s of Fact and Conclusions of Law in accordance with Equity Rule 70½;

Now, upon consideration thereof, and upon motion of plaintiff, by the United States Attorney for the Southern District of New York, and by Harold M. Stephens, Assistant Attorney General, and James Fly and Walter L. Rice, Special Assistants to the Attorney General, for relief in accordance with the prayer of the petition, and defendants Spreckels Sugar Corporation, Rudolph Spreckels, W. W. Harper and Edgar H. Stone, having appeared by their attorneys, Messrs. Cadwalader, Wickersham & Taft, and all the other defendants having appeared by their attorneys, Messrs. Sullivan & Cromwell, it is hereby ordered, adjudged, and decreed:

I. That the Court has jurisdiction of the subject matter hereof and of all parties hereto; that the petition states a cause against defendants under the Act of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209), commonly known as the Sherman Anti-Trust Act;

II. That all of the defendant Corporations, firms and individuals have engaged in a combination and conspiracy to restrain trade and commerce in sugar among the several states and in the District of Columbia in violation of the said Sherman Anti-Trust Act.

III. That the petition is dismissed as to defendants George M. Rolph and William Henderson (both deceased) insofar as they are individual parties to this action and as to W. W. Harper and Edgar H. Stone.

IV. That as hereinafter used:

1. "Said defendants" shall mean all the defendant corporations, firms and individuals, except George M. Rolph, William Henderson, W. W. Harper and Edgar H. Stone.

2. "Representatives" shall mean all the officers, agents, attorneys, servants and employes of each or any of said defendants and all persons acting under, through, by or in behalf of each or any of said defendants or claiming so to act.

3. "Program" shall mean any agreement, understanding or concerted action, including, but without limiting the

generality of the foregoing, any rule, policy or code provision or interpretation, concertedly adopted or maintained.

[fol. 376] V. That the said defendants and their representatives are hereby perpetually enjoined, restrained and prohibited, individually and collectively, in connection with the sale, marketing, shipment, transportation, storage, distribution or delivery of refined sugar from engaging or attempting to engage directly or indirectly with one another or with any competitor, through any program, in

1. Effectuating any general plan to give the same terms, conditions, or freight applications to customers, regardless of the varying circumstances of particular transactions or classes of transactions or regardless of the varying situation of particular refiners, distributors or customers or classes thereof;

2. Selling only upon or adhering to prices, terms, conditions or freight applications announced, reported or relayed in advance of sale or refraining from deviating therefrom;

3. Effectuating any system for or systematically reporting to or among one another or competitors or to a common agency, information as to current or future prices, terms, conditions, or freight applications, or lists or schedules of the same;

4. Relaying by or through The Sugar Institute, Inc., or any other common agency, information as to current or future prices, terms, conditions or freight applications, or any list or schedule of the same.

5. Giving any prior notice of any change or contemplated change in prices, terms, conditions, or freight applications, or relaying, reporting or announcing any such change in advance thereof;

6. Restraining or preventing repricing, or limiting the period during which or the extent to which a sales contract may be repriced or new prices arranged therefor;

7. Effectuating any system of gathering and/or disseminating statistical information regarding melt, sales, deliveries, stocks on hand, stocks on consignment, stocks in

transit, volume of sugar moved by differential or other particular routes or types of routes, new business or any other statistical information of a similar character, whereever and to the extent that said information is not made, or is not readily, fully and fairly available to the purchasing and distributing trade;

8. Requiring, persuading or requesting third parties to abide by or conform to any program enjoined by this decree;

9. Meeting, suppressing, or restraining prices, terms, conditions, or freight applications of particular refiners or distributors;

10. Requiring or requesting any broker, warehouse, customer, carrier, trucking concern, or any combination thereof, [fol. 377] to elect to perform one or more such distribution functions to the exclusion of others or to discontinue or refrain from any distribution function or to dispose of any business or property interest;

11. Obtaining, requesting, exacting or attempting to exact pledges or uniform contracts or obligations from any broker as part or in aid of any program enjoined by this decree;

12. Obtaining, requesting, exacting, or attempting to exact non-rebating agreements from any broker, warehouseman or trucking concern;

13. Making or circulating lists of warehouses, brokers, carriers or trucking concerns employed or to be employed by any refiner or competitor, as a part or in aid of any program enjoined by this decree;

14. Refusing or threatening to refuse to deal with any broker, warehouse, customer, trucking concern, carrier or any combination thereof, as part or in aid of any program enjoined by this decree;

15. Dealing or threatening or purporting to deal exclusively or primarily with any defined group or class of brokers, warehouses, customers, carriers or trucking concerns, as a part or in aid of any program enjoined by this decree;

16. Subjecting or threatening to subject any broker, warehouseman, customer, carrier, trucking concern, or any combination thereof, or any agent of any refiner to any loss of business or employment, damage, injury, forfeiture, fine or penalty, as a part or in aid of any program enjoined by this decree;

17. Determining or restricting brokerage commissions or fees;

18. Determining transportation charges or freight applications to be collected from customers, or limiting freight absorptions;

19. Selling only on delivered prices or on any system of delivered prices, including zone prices or refusing to sell f. o. b. refinery;

20. Restricting routes of shipments;

21. Making or disseminating at or through The Sugar Institute, Inc., or any other common agency, any freight book or digest of freight applications or selling terms, or conditions, or supplying information relating thereto, but the foregoing shall not be construed to prevent said defendants from agreeing to report and relay announcements of prices, terms, conditions or freight applications in past and closed transactions through The Sugar Institute, Inc. or a common agency;

[fol. 378] 22. Preventing, restraining, or refusing to grant the privilege of transiting or diverting shipments, but the foregoing shall not be construed to prevent said defendants from freely discussing and advising one another as to the most effective means for taking steps individually to prevent fraudulent use of transiting and diversion privileges;

23. Requiring, inducing, or requesting water carriers to announce rates or terms openly in advance or to agree not to deviate from such announced rates or terms or to agree not to carry or to refuse to carry sugar except upon such openly announced rates or terms.

24. Preventing, restraining or refusing to enter into private charters;

25. Preventing, restraining or refusing to participate with customers in pool-car or pool-cargo shipments;

26. Determining switching charges or restricting the absorption thereof;

27. Imposing service or extra charges;

28. Eliminating, reducing, limiting or restricting consignment points, reconsignment points, or storage at ports of entry or other points;

29. Imposing a service charge on less than carload deliveries, or on any deliveries from consignment;

30. Preventing, restraining or refusing to enter into long term contracts, or refusing to arrange for deliveries over periods in excess of thirty days;

31. Submitting contracts or informaation to the Sugar Institute or any other agency before entering into any contract or sale;

32. Determining whether or to what extent to relax or change contract terms, or using statistics of unspecified or undelivered contract balances as a part or in aid of such conduct;

33. Preventing, restraining or refusing to grant quantity or other discounts where such discounts reflect, effect, or result in economies to refiners either in direct or indirect costs;

34. Preventing, restraining or refusing to enter into tolling arrangements for customers;

35. Preventing, restraining or refusing to enter into tolling arrangements for others than customers as a part or in aid of any program enjoined by this decree;

36. Preventing, restraining or refusing to grant the four-payment plan or split billing;

[fol. 379] 37. Fixing, restraining or refusing to grant cash discounts, or restricting the periods for which cash discounts are granted;

38. Preventing, restraining or refusing to grant price guaranties;

39. Preventing, restraining or refusing to make allowances on containers, used bags, or customers' bags or containers or discouraging experiments with or preventing or restraining the use of new types of containers;

40. Preventing, restraining or refusing to arrange the packing or selling of private brands.

41. Preventing, restraining or refusing to make resales of sugar or sales of second-hand sugar, but the foregoing shall not be construed to prevent said defendants from agreeing to invoice resales to the original buyers;

42. Preventing, restraining or refusing to make sales of damaged sugar or frozen stocks;

43. Requesting, obtaining, exacting or attempting to exact any promise or agreement from any merchant or distributor to maintain any price;

44. Requiring buyers to elect between the guarantee and non-guarantee form of contract at the time of entering the contract or at any other time before delivery or refusing to grant buyers the privilege of changing from one destination to another by resale or otherwise;

45. Engaging in any policing activities or investigating or maintaining any system of investigation, or examining files, records or stocks, or holding any trials, to ascertain or prevent violations of or departure from any program enjoined by this decree;

VI. That said defendants and their representatives, individually and collectively, are hereby directed forthwith to cancel such part of all outstanding pledges and agreements with brokers, warehousemen, carriers and trucking concerns and agreements with parties for whom sugar has been or is being tolled, as obligates such brokers, warehousemen, carriers, trucking concerns or parties to support or adhere to any program enjoined by this decree;

VII. That jurisdiction of this cause is hereby retained for the purpose of enforcing, enlarging or modifying the terms of this decree and to enable any party hereto to apply to the court for such other orders, directions and decrees as may be necessary and proper for the aforesaid purpose.

VIII. Any program enjoined by this decree is enjoined without prejudice to applications by any party hereto for [fols. 380-382] such modification of this decree as may be necessary and proper to permit adopting, maintaining and effectuating such program insofar as such program may be

permissable under and pursuant to the act of Congress of June 16, 1933, known as the National Industrial Recovery Act and/or the act of Congress of May 12, 1933, known as the Emergency Farm Relief Act and/or any other present or future statutes of the United States.

IX. That the plaintiff have and recover from the defendants all costs of this suit, except the amounts allowed to the Special Master pursuant to agreement of the parties to share therein in equal parts.

Julian W. Mack, United States Circuit Judge.
October 9, 1934.

[fol. 383] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL

To the Honorable Julian W. Mack, Judge in Said Court and Cause Presiding:

And now come The Sugar Institute, Inc., The American Sugar Refining Company; Margaret A. Jamison and Martha A. Jamison, doing business under the firm name and style of Arbuckle Bros.; California & Hawaiian Sugar [fol. 384] Refining Corporation, Ltd., Colonial Sugars Co., The Cuban-American Sugar Co., Godchaux Sugars, Inc., William Henderson, Hunt Henderson, Christian J. Gambel and Frederick A. Gambel, doing business under the firm name and style of William Henderson (described in the petition as Henderson Sugar Refinery), Imperial Sugar Company, W. J. McCahan Sugar Refining & Molasses Co., The National Sugar Refining Co. of New Jersey, Pennsylvania Sugar Company, Revere Sugar Refinery, Savannah Sugar Refining Corporation, Texas Sugar Refining Corp.; J. D. and A. B. Spreckels Investment Company, substituted for J. D. and A. B. Spreckels Securities Co. (doing business under the trade name of Western Sugar Refinery); J. F. Abbott, Earl D. Babst, W. Edward Foster, J. P. Cody, M. E. Goetzinger, William B. Tyler, C. B. Newman, George E. Keiser, Jacob Moog, I. H. Kempner, Harry G. Thompson, Louis V. Place, Manuel E. Rionda, James H. Post, Charles D. Bruyn, William H. Hoodless, Henry E. Worcester, Benjamin O. Sprague, Thomas Oxnard, Alexander Smith, H. B. Moore, Frank E. Sullivan and Fred G. Taylor,

by Sullivan & Cromwell, their attorneys, and feeling themselves aggrieved by the final decree of this Court entered herein on the 9th day of October, 1934, hereby pray that an appeal may be allowed to the said defendants from the said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and that a complete transcript of the record, proceedings and evidence upon which said decree is based, duly authenticated, may be sent to the Clerk of the Supreme Court of the United States; that the amount of the appeal bond and the time for filing the same may be fixed, and that the time for the presentation and filing of a præcipe may be fixed and determined.

Dated, New York, December 7, 1934.

[fols. 385 & 386] The Sugar Institute, Inc., The American Sugar Refining Company; Margaret A. Jamison and Martha A. Jamison, Doing Business Under the Firm Name and Style of Arbuckle Bros.; California & Hawaiian Sugar Refining Corporation, Ltd., Colonial Sugars Co., The Cuban-American Sugar Co., Godchaux Sugars, Inc., William Henderson, Hunt Henderson, Christian J. Gambel and Frederick A. Gambel, Doing Business Under the Firm Name and Style of William Henderson (described in the petition as Henderson Sugar Refinery); Imperial Sugar Company, W. J. McCahan Sugar Refining & Molasses Co., The National Sugar Refining Co. of New Jersey, Pennsylvania Sugar Company, Revere Sugar Refinery, Savannah Sugar Refining Corporation, Texas Sugar Refining Corp.; J. D. and A. B. Spreckels Investment Company, Substituted for J. D. and A. B. Spreckels Securities Co. (Doing Business under the trade name of Western Sugar Refinery); J. F. Abbott, Earl D. Babst, W. Edward Foster, J. P. Cody, M. E. Goetzinger, William B. Tyler, C. B. Newman, George E. Keiser, Jacob Moog, I. H. Kempner, Harry G. Thompson, Louis V. Place, Manuel E. Rionda, James H. Post, Charles D. Bruyn, William H. Hoodless, Henry E. Worcester, Benjamin O. Sprague, Thomas Oxnard, Alexander Smith, H. B. Moore, Frank E. Sullivan, Fred G. Taylor, By Sullivan & Cromwell, Their Attorneys.

[fol. 387] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS

And now come The Sugar Institute, Inc., The American Sugar Refining Company; Margaret A. Jamison and Martha A. Jamison, doing business under the firm name and style of Arbuckle Bros., California & Hawaiian Sugar Refining Corporation, Ltd., Colonial Sugars Co., The Cuban-[fol. 388] American Sugar Co., Godchaux Sugars, Inc.; William Henderson, Hunt Henderson, Christian J. Gambel and Frederick A. Gambel, doing business under the firm name and style of William Henderson (described in the petition as Henderson Sugar Refinery); Imperial Sugar Company, W. J. McCahan Sugar Refining & Molasses Co., The National Sugar Refining Co. of New Jersey, Pennsylvania Sugar Company, Revere Sugar Refinery, Savannah Sugar Refining Corporation, Texas Sugar Refining Corp.; J. D. & A. B. Spreckels Investment Company, substituted for J. D. & A. B. Spreckels Securities Co., (doing business under the trade name of Western Sugar Refinery); J. F. Abbott, Earl D. Babst, W. Edward Foster, J. P. Cody, M. E. Goetzinger, George M. Rolph, William B. Tyler, C. B. Newman, George E. Keiser, Jacob Moog, I. H. Kempner, Harry G. Thompson, Louis V. Place, Manuel E. Rionda, James H. Post, Charles D. Bruyn, William H. Hoodless, Henry E. Worcester, Benjamin O. Sprague, Thomas Oxnard, Alexander Smith, H. B. Moore, Frank E. Sullivan and Fred G. Taylor, by Sullivan & Cromwell, their attorneys and say that in the record and proceedings of the said Court in the above entitled cause and in the final decree made and entered therein on the 9th day of October, 1934, there is manifest error, and for error the said defendants assign the following:

1. Because the Court erred in holding that the defendants have engaged in an unlawful combination and conspiracies, which have unreasonably restrained trade and commerce in sugar among the several states and in the District of Columbia, in violation of the Act of July 2, 1890, commonly known as the Sherman Anti-Trust Act.

[fol. 389] 2. Because the Court erred in finding that there is no substantial evidence that the pre-Institute situation caused or would cause substantial injury to the "ethical" refiners as a class, and that these refiners had no part in the first steps taken to form the Institute.

3. Because the Court erred in finding that the declining profits in the industry for the year 1927 must be attributed, at least in large part, to causes other than the secret concession system.

4. Because the Court erred in finding that the Department of Justice was not notified of various important steps taken by the Institute.

5. Because the Court erred in finding that the purposes of the defendants in organizing the Institute, as enumerated in Finding 35, were for the most part only incidental to the dominant purposes enumerated in Finding 36.

6. Because the Court ered in finding that the dominant purposes of the defendants in organizing the Institute were to create and maintain a uniform price structure, thereby eliminating and suppressing price competition among themselves and other competitors; to maintain relatively high prices for refined, as compared with contemporary prices of raw sugar; and to improve their own financial position by limiting and suppressing numerous contract terms and conditions. And in holding that in their efforts to accomplish these purposes defendants have ignored the interests of distributors and consumers of sugar.

7. Because the Court erred in finding that to abolish discrimination between customers was not one of the dominant purposes of the defendants in forming the Sugar Institute.

[fol. 390] 8. Because the Court erred in finding that the agreement among defendants to abolish all discriminations between customers amounted in general purpose and effect to an agreement not to afford different treatment to different customers, regardless of the varying circumstances of particular transactions or classes of transactions, and regardless of the varying situation of particular refiners, distributors, customers, or classes thereof.

9. Because the Court erred in finding that, under the guise of performing the agreements against discriminations, defendants limited and suppressed numerous important contract terms and conditions in the particulars set forth in the findings, chiefly for the purpose and with the effect of accomplishing the objectives described in Finding 36.

10. Because the Court erred in finding that the defendants in most of their activities went further than was reasonably necessary to eliminate fraud, waste and secret, unfair or illegal discrimination in the industry.

11. Because the Court erred in finding that a purpose and effect of the agreement to sell only on the basis of open public announcement in advance of sales was to aid defendants in preventing and limiting certain types of transactions in which private negotiations are essential.

12. Because the Court erred in finding that the assurance of each refiner that competitors would not vary prices without advance open announcements tended toward maintenance of price levels relatively high as compared with raws.

[fol. 391] 13. Because the Court erred in finding that sugar buyers to whom discriminations in favor of other buyers became known would have succeeded in securing like favorable treatment or the discriminatory favor would have had to be withdrawn.

14. Because the Court erred in finding that it was not shown to be impracticable to give immediate publicity to the prices, terms and conditions in all closed transactions, and in finding that such a system would in general have resulted in preventing any unfair competition caused by the secret concession system, without an agreement to sell only on the basis of open public announcement in advance of sales.

15. Because the Court erred in holding that the agreement of the defendants to sell sugar only on prices, terms and conditions announced in advance of sales, the actions pursuant thereto, and the reporting system in aid thereof, constitute undue and unreasonable restraint of trade.

16. Because the Court erred in finding that the Institute and Institute officials rebuked members and non-members for announcing or continuing terms and conditions more favorable than those recommended by the Institute or agreed to by defendants, and otherwise sought to and did induce withdrawals and limitations of such favorable terms and conditions, thereby unduly and unreasonably restraining trade, and in finding that the use of the Institute as a clearing house for information concerning changes in terms and conditions aided in such activities.

17. Because the Court erred in holding that defendants sought to develop and developed a practice of giving the fol. 392] Institute and competitors advance notice of contemplated use of some competitive devices for the purpose and with the effect of enabling concerted, undue and unreasonable limitation of such practices.

18. Because the Court erred in finding that statistics relating to the total production, total deliveries and calculable stocks, which defendants made available to the purchasing trade, could have had only a limited significance for the individual purchaser and were likely to mislead him.

19. Because the Court erred in finding that by collecting and circulating only among themselves information as to production and deliveries of individual refiners, as to deliveries by states, as to deliveries by states by all the important differential routes and as to consigned and in-transit stocks for the several states the refiners obtained an unfair advantage with respect to purchasers.

20. Because the Court erred in finding that defendants' failure to make complete disclosures to the trade of statistics relating to production and deliveries of individual refiners, to deliveries by states, to deliveries by states by all the important differential routes, to consigned and in-transit stocks for the several states is in itself an undue and unreasonable restraint of trade.

21. Because the Court erred in holding that the collection and dissemination by and among defendants of statistical information regarding melts, deliveries, stocks on hand, stocks on consignment, stocks in transit and the vol-[fol. 393] ume of sugar moved by differential routes with-

out making such information available to the purchasing trade unduly and unreasonably restrains trade and commerce in sugar in violation of the Sherman Anti-Trust Act.

22. Because the Court erred in finding that defendants entered into, faithfully observed and rigorously enforced an agreement that refiners should refuse to deal with a broker, warehouseman or customer who admittedly or by Institute finding was acting directly or indirectly for any of them, or for any beet, off-shore or other sugar interest, in other than the one elected capacity, and in finding that cooperation of the Domestic Sugar Bureau, off-shore and Edgar interests in such an agreement was sought and obtained.

23. Because the Court erred in finding that the Institute circulated the information submitted by the individual refiners as to infractions of the rules concerning brokers and warehousemen, and in finding that where the Institute committee found a combination of functions the concern was disqualified from acting as a broker or warehouseman.

24. Because the Court erred in finding that the purpose of circulating the warehouse lists was to aid in the enforcement of the policy against combination of functions and in finding that when brokers or warehouses were disqualified they would, as a matter of course, be dropped from the lists.

25. Because the Court erred in finding that there is no substantial evidence that the pre-Institute secret concessions and fraudulent practices did or would lead to monopolies among the distribution agencies.

[fol. 394] 26. Because the Court erred in finding that one of the purposes of defendants in compelling the separation of occupations was to aid in preserving the uniformity of price structure.

27. Because the Court erred in finding that defendants' policy against combination of functions was effectuated in a harsh and arbitrary manner without regard to the effect on third parties in that: (a) Under the Institute rules and practice, for a broker or warehouseman to be reinstated after disqualification, application had to be made by

an Institute member; the disqualified concern itself had no standing. (b) Confronted by special cases where even the possibilities of the actual and supposed evils of which defendants complained were so remote as to be virtually nonexistent, defendants made no effort to devise a system for correcting abuses which would not involve serious injustice. (c) The requirement of a sudden election of but one of several activities disrupted substantial business set-ups of long standing. (d) Honest concerns were deliberately made to suffer with the dishonest.

28. Because the Court erred in finding that defendants could have secured adequate protection against secret concessions and fraudulent practices through practicable means less drastic than compelling a separation of occupations; that defendants made no real effort in this direction; that such less drastic means were readily available to defendants, and would probably have proved no more difficult or expensive than the means actually adopted to compel separation of functions, and would not have taxed unduly the finances, efficiency or ingenuity of the Institute; [fol. 395] and that their preference for the procedure actually adopted was due to their interest in preserving the price structure.

29. Because the Court erred in finding that the defendants agreed upon the commissions to be paid brokers; that the reason for adopting the agreement was to prevent a growing competition in bidding for brokers' services; that the reason commissions did not vary prior to the Institute was because other inducements were then offered brokers by refiners, such as storing sugar with them, and that when such inducements were prohibited competition in bidding for services if permitted would naturally result in varying commissions.

30. Because the Court erred in finding that the refiners agreed that they would not deal with any broker or warehouseman who did not sign a contract according to a form recommended by the Institute and that the Institute checked up on the several refiners and saw to it that this understanding was carried out.

31. Because the Court erred in finding that in essence the warehouse agreement provided that if the warehouse

company granted any rebate or concession, secret or otherwise, to any of its customers without granting the same rebate or concession to all, it should forfeit to the refiner employing it an amount equal to such rebate or concession.

32. Because the Court erred in holding that by concertedly refusing to deal with any independent brokers, warehousemen, and customers except such brokers and warehousemen as signed the broker's and warehouse agreement, and in concertedly fixing brokers' commissions, defendants unduly and unreasonably restrained trade.

[fol. 396] 33. Because the Court erred in finding that the special relations which brokers and warehousemen occupied towards refiners did not justify the actions taken.

34. Because the Court erred in finding that defendants concertedly adopted and agreed to a rule not to charge differential rates on deliveries from consignment or otherwise than on direct shipments made over differential routes at customers' request, and to charge customers all rail freight applications on all deliveries made on refiners' account.

35. Because the Court erred in finding that C. & H. had a special arrangement with producers of the raws that it purchased, in effect to assume freight absorptions.

36. Because the Court erred in finding that concealment of statistics on shipments over differential routes from the customers placed them at a disadvantage and that with respect to this data as well as other statistics as described in Finding 65 of the Findings of Fact, defendants dealt unfairly with the trade.

37. Because the Court erred in finding that the discrimination between customers caused by absorptions in certain territories was only a claimed justification for Code 3 (c); that in seeking to put into effect the arbitrary freight rate for all deliveries on refiners' account, regardless of the actual cost of transportation, defendants' real purpose was to further their own interests, regardless of those of their customers, by preventing the breakdown of the freight structure; and that there is a substantial probability that defendants may again attempt to make Code 3 (c) or a similar principle effective.

38. Because the Court erred in finding that the refiners' [fol. 397] transportation problems in the Great Lakes and Warrior River areas, those which Code 3(c) had been chiefly designed to solve, were finally solved by a system of delivered prices with denial of the privilege of purchasing f. o. b. refinery; that after discussion, deliberation and study by the defendants, begun in the spring of 1928, crystallization of sentiment therefor with important figures in the Institute, some definitely and some in practical effect advocating such a delivered price plan, and general agreement expressed at an Institute meeting as to the desirability thereof, such a system was introduced (a) in a substantial and highly competitive territory in the Great Lakes area in April, 1929, and (b) in a substantial and highly competitive territory, the Warrior River area in December, 1929; that there is substantial evidence from which the inference may reasonably be drawn that the refiners acted, not independently, but concertedly and as the result of combination and conspiracy, in introducing the delivered prices; and that the defendants agreed to maintain and concertedly maintained the system of delivered prices in both the Great Lakes and Warrior River areas.

39. Because the Court erred in finding that during the period of delivered prices, defendants concertedly maintained freight applications at figures in general substantially higher than the actual freight rates over differential routes carrying a substantial sugar traffic.

40. Because the Court erred in finding that in the fall of 1929, defendants, acting concertedly through the Institute, sought and obtained the assurance of the American [fol. 398] off-shore selling agencies that they would adhere to, and conspired with them to adhere to, the delivered prices of the Institute members.

41. Because the Court erred in finding that from the time when delivered prices were first made effective, defendants intentionally created the impression in dealing with off-shore interests, with brokers, with Edgar and numerous sugar buyers in the Great Lakes and the Warrior River areas, that the refiners had an understanding not to sell f. o. b. refinery, and that the Institute was responsible therefor; that numerous buyers in the Great Lakes and the Warrior River territories were informed by responsible

representatives of defendants that the denials of the privilege of purchasing f. o. b. refinery were due to Institute rules and, in effect, to the refiners' understanding with one another that they would maintain delivered prices; and that these explanations were not mere excuses or alibis but were in substance the genuine reasons for the refusal to make such sales.

42. Because the Court erred in finding that through the Institute defendants concertedly policed delivered prices and investigated alleged departures therefrom for the purpose of aiding in maintaining the delivered prices.

43. Because the Court erred in finding that delivered prices, as employed by defendants, caused virtually the same type of discrimination which defendants professed the desire to eliminate by Code 3(c); and that they caused discrimination against those customers who were charged the arbitrarily high delivered prices, as absorption caused a discrimination against those who were charged actual cost of transportation.

[fol. 399] 44. Because the Court erred in finding that the delivered prices concertedly maintained by defendants were patently unreasonable.

45. Because the Court erred in finding that defendants concertedly sought to, and for a time at least did, maintain delivered prices in Texas as well as in the Great Lakes and the Warrior River areas, when there were signs of a breakdown.

46. Because the Court erred in finding that in November, 1931, America again announced delivered prices, all refiners followed, except Arbuckle, and accordingly the attempt failed; and that there is a strong probability that unless restrained, defendants, to solve their transportation problem, may again adopt delivered prices.

47. Because the Court erred in finding that defendants' adoption of Code 3(c), their actions pursuant thereto, and their concerted maintenance of delivered prices constituted undue and unreasonable restraint of trade.

48. Because the Court erred in finding that the system of freight application announcements and the "freight book" were used by the Institute in aid of its efforts to

make Code 3(c) effective; and that they were also a vital link in the Institute's activities to maintain delivered prices.

49. Because the Court erred in finding that the "freight book" was used in aid of the concerted activities with respect to transportation matters generally and contract terms; that the Institute book filled no real need of the industry and is unjustified.

50. Because the Court erred in finding that because of the artificiality in the freight applications charged by the [fol. 400] several refiners both before and increasingly since the Institute, there were opportunities for using transiting and diversion privileges to get sugar to ultimate destination at a cost to the purchaser below that of the announced freight application of the refiner.

51. Because the Court erred in finding that the Code interpretations containing recommendations with respect to transiting and diversion were designed to prevent, and defendants agreed to prevent, any transiting and diversion by customers, even openly, when they would defeat freight applications; that defendants' agreement in this respect and actions pursuant thereto were essential to the success of their concerted efforts since the Institute to maintain artificial freight rate structures; that they were for the purpose of aiding and maintaining such structures and constituted undue and unreasonable restraint of trade.

52. Because the Court erred in finding that concerted action was unnecessary to combat the fraudulent use of these privileges; that individual refiners could have taken effective steps to make sure that frauds were not practiced upon them; and that the discrimination that resulted from their use, if they were used openly, was neither more nor less vicious than the discrimination inherent in the artificiality of freight structures which the defendants, either independently or in concert, employed.

53. Because the Court erred in finding that defendants induced transportation companies operating on the New York State Barge Canal to openly announce their rates and terms by the concerted threat of withholding business from

carriers who did not so openly announce their rates and terms; that an important purpose of the defendants in [fol. 401] seeking these agreements was to effect a stabilization of transportation rates; and that defendants' conduct in this respect constituted undue and unreasonable restraint of trade.

54. Because the Court erred in finding that recommendations of the Institute with respect to private charters went further than was necessary to accomplish the end of preventing secret rebating; that the real aim was to assist in the preservation of the price structure; and that defendants' conduct in this respect constituted undue and unreasonable restraint of trade.

55. Because the Court erred in finding that defendants' purpose in refusing to participate in customers' pool cars or cargoes was not, as claimed, to eliminate discrimination; that even if, due to refining schedules and sales requirements, refiners could not grant this privilege to all customers, there is nothing unfair in an apparent discrimination which results solely from the necessary limitations of a refiner's capacity in this respect; and that defendants' conduct in this respect constituted undue and unreasonable restraint of trade.

56. Because the Court erred in finding that defendants agreed to use only trucking concerns not affiliated with any buyer, broker or warehouse and then only under non-rebating contracts; that the alleged justifications for the general policy and acts pursuant thereto are without merit; and that defendants' conduct in this respect constituted undue and unreasonable restraint of trade.

57. Because the Court erred in finding that defendants agreed that members should adopt in all territories the practice of not absorbing switching charges on deliveries from consigned stocks to buyer's warehouse or spur, with [fol. 402] certain exceptions; that defendants' agreement was not adopted, as claimed, to prevent discrimination; and that defendants' conduct in this respect constituted undue and unreasonable restraint of trade.

58. Because the Court erred in finding that the Institute recommendation of the usual specific reconsignment points

was an intentional restriction to the points named and tended to prevent an increase.

59. Because the Court erred in finding that limitation of ports of entry as consignment points is more serious than elimination of ordinary consignment points, insofar as it shuts a competitor out of a particular territory.

60. Because the Court erred in finding that refiners' consignment service was valuable and beneficial to substantial elements in the trade.

61. Because the Court erred in finding that while the ex-consignment business of the small refiner unable to finance as many stocks as his large competitor, was necessarily restricted, limitation of consignment points had some disadvantages for him.

62. Because the Court erred in finding that while the cost of increased consignment points might well be reflected in a higher general basis price, there is no assurance that the savings effected through some reductions thereof would be passed on to consumers generally; that the result in either case is largely speculative; that by shipping sugar to consignment over a differential route and charging for transportation on ex-consignment sales as if shipped over a higher rate route, defendants recouped themselves at times for the service; that refiners [fol. 403] individually could, as they concertedly did, at one time, impose a service charge on consignment deliveries.

63. Because the Court erred in finding that communities eliminated as consignment points suffered as against neighboring ones because of the advantage thereby accruing to the latter points.

64. Because the Court erred in finding that the elimination of consignment points also eliminated from distributing agencies, one type of jobber, the "desk" jobber.

65. Because the Court erred in finding that a 5¢ charge on all l. c. l. deliveries ex-consignment was agreed to by defendants, and that the charge was discontinued early in 1929.

66. Because the Court erred in finding that defendants' concerted conduct with respect to elimination and reduc-

tion of consignment points, reconsignment points and ports of entry, and with respect to imposing a service charge on l. c. l deliveries ex-consignment, unduly and unreasonably restrained trade.

67. Because the Court erred in finding that the defendants agreed not to or concertedly refused to enter into long-term contracts, and that any agreement or concerted action of defendants prevented the making of long-term contracts having a real economic value to refiner or consumer, and that customers' endeavors since the Institute to obtain larger than 30-day contracts from defendants were unsuccessful.

68. Because the Court erred in finding that there is no substantial evidence that manufacturers who bought sugar from the refiners had sold or were likely to sell such [fol. 404] sugar.

69. Because the Court erred in holding that concerted action in either prohibiting long-term contracts or in insisting on open announcement in advance of entering into any such contract was without justification; in finding that an obligation to adhere to such open announcement would tend to prevent many entirely fair contracts, in finding that the abolition of long-term contracts was effected largely through defendants' agreement, in finding that many long-period contracts would necessarily have to be arranged by private negotiations and therefore would be prevented or rendered practically impossible by a requirement for open announcement, in finding that the purpose of requiring such open announcement must be deemed to be the prevention of such contracts, and in finding that in their actions in this connection defendants were not interested in preventing unfair discriminations, but were acting for the purpose of preserving the price structure, and in disregard of the interests of customers, and that their actions constituted undue and unreasonable restraint of trade.

70. Because the Court erred in finding that Edgar's contracts, referred to in Finding 152, threatened the Institute project only insofar as the Institute was concerned with uniformity of price structure, and in finding that defendants' purpose in obtaining the agreement from Edgar was to preserve that structure.

71. Because the Court erred in finding that defendants were without justification in acting concertedly to determine whether and to what extent to relax the rigid enforcement of the 30-day contract; and in holding that the elim-
[fol. 405] ination of long-term contracts, the Edgar price maintenance agreement and the concerted action with respect to enforcement of the 30-day contracts constituted undue and unreasonable restraint of trade.

72. Because the Court erred in finding that the refiners agreed not to grant and concertedly refused to grant quantity discounts for sales with the type of deliveries which would result in savings to the refiners.

73. Because the Court erred in finding that a discount, based solely on quantity, would have been justified.

74. Because the Court erred in finding that sugar buyers were refused discounts for taking direct carload rather than ex-consignment deliveries, and in finding that this refusal was because of the understanding among the refiners that no special discounts of any kind should be allowed, regardless of the economic justification therefor.

75. Because the Court erred in finding that the demand for sugar is elastic; that encouragement of large sales through quantity discounts may be reasonably expected to tend in the long run to build up total production and thereby effect economies for the refiners; that a quantity discount to those wholesalers selling to manufacturers, as well as to manufacturers buying directly from the refiner, may result in a substantial increase in sugar consumption; that defendants did not regard the demand as inelastic; and that in many cases a discount based solely on quantity would have been justified even under defendants' economic theory.

76. Because the Court erred in finding that defendants prohibited quantity and other discounts in order to pre-
[fol. 406] serve uniformity of price structure, and that defendants preferred to have all sugar sold in any given area at precisely the same price and terms rather than to effect economies in its sale and distribution.

77. Because the Court erred in holding that in prohibiting quantity and other discounts, defendants unduly and unreasonably restrained trade.

78. Because the Court erred in finding that the refiners' benefit from tolling was in not having to finance the raw sugar.

79. Because the Court erred in finding that some agreement on the subject of tolling was effected by defendants during the preliminary organization meetings in December, 1927.

80. Because the Court erred in finding that after a tolling contract made by a refiner with a manufacturer in July, 1928, was condemned by the Institute as a Code violation, defendants agreed not to make and concertedly refused to make tolling contracts for any purchasers of refined sugar and further agreed not to toll and concertedly refused to toll for raw producers except after exacting an agreement from such producer to sell the tolled sugar in accordance with the Code.

81. Because the Court erred in finding that defendants' dominant purpose in their activities with respect to tolling was not to prevent unfair discrimination but to prevent sales of sugar at prices, terms and conditions which would jeopardize the price structure.

82. Because the Court erred in holding that the activities [fol. 407] on the part of defendants with respect to tolling for customers unduly and unreasonably restrains trade and commerce.

83. Because the Court erred in finding that defendants concertedly and by agreement substantially and effectively limited the area in which the four-payment plan was offered and the extension thereof, and that the defendants did not confine their activities to open announcement of the four-payment plan; and in holding that the restraints imposed by defendants on the four-payment plan were undue and unreasonable.

84. Because the Court erred in holding that secret concessions in split billing could have been prevented without prohibiting the practice itself, and in finding that defendants concertedly prevented, limited and suppressed the extension of the practice in substantial areas and thereby imposed undue and unreasonable restraints of trade, and in finding that there is a substantial probability of further concerted action in respect to split billing unless restrained.

85. Because the Court erred in finding that defendants took steps to preserve the two percent. discount for cash and to prevent competition in this respect and thereby unduly and unreasonably restrained trade.

86. Because the Court erred in finding that the defendants concertedly attempted to restrain competition in respect to the discount period on shipments by differential routes in common territory reached by Eastern and New Orleans refineries for the purpose (a) of equalizing their own opportunities, (b) of discouraging shipments over differential routes, and (c) of preventing a breakdown in the [fol. 408] high freight applications which they aimed to maintain; that so-called "uniform definitions" were adopted as part and in aid of such concerted activities; that as a result of said activities more liberal payment terms were suppressed; that trade was unduly and unreasonably restrained thereby and that there is substantial probability that unless restrained they will again engage in similar activities.

87. Because the Court erred in finding that the defendants acted concertedly in seeking to prevent a revival of the price guarantee and in restricting the guarantee as to the route of shipments and the territories where it should apply; that the Eastern and Southern refiners' disapproval of the guarantee was not based, as claimed, on alleged discriminations caused thereby and that defendants' restraints on the guarantee were undue and unreasonable.

88. Because the Court erred in finding that an allowance to certain customers for the return of refiners' used bags or for the customer supplying and re-using his own bags could be effected without substantial expense to the refiner.

89. Because the Court erred in finding that pursuant to agreement defendants concertedly discontinued and prohibited the making of allowances to customers for return of used bags or for using customers' own bags and that defendants have concertedly refused requests for such allowances, and in finding that defendants concertedly discouraged experiments with new types of containers and thus disregarded the public's interest in the development of more economical methods in the distribution of sugar, [fol. 409] and in finding that the practice of making a bag allowance promised substantial economies in sugar distri-

bution and that defendants suppressed it in its experimental stage.

90. Because the Court erred in finding an agreement against bag allowances and that the Institute cooperated with the Domestic Sugar Bureau in enforcing an agreement against bag allowance, and in finding that defendants' objection to granting used-bag allowances was not that such allowance would necessarily be discriminatory but that they might conceivably be made a cloak for secret concessions, and in finding that the practice of making used-bag allowances had not been used as a cloak for secret concessions, and in finding that defendants could readily have given bag allowances without unfair discrimination between customers.

91. Because the Court erred in finding that the activities on the part of the defendants with respect to allowances on used bags or customers' bags, or with respect to experiments with new types of containers unduly and unreasonably restrains trade.

92. Because the Court erred in finding that defendants in substance agreed that private-brand business was not to be generally accepted and as a result thereof individual refiners refused such business and that defendants agreed that they would accept such business in no event without reporting it to their competitors, and in finding that reports of the acceptance of private-brand business were made for the purpose of affording opportunity for applying concerted pressure against acceptance, and in finding that defendants failed to show that private brands could not have been used for all customers desiring them, and in finding [fol. 410] that private brands are neither more nor less deceptive than the refiner's own brand names, that there is no substantial evidence that packing private brands entails substantial expense to refiners and that there is no reason why individual refiners might not make a service charge if expense were entailed in packing private brands.

93. Because the Court erred in finding that the activities on the part of defendants with respect to the packing of private brands unduly and unreasonably restrains trade.

94. Because the Court erred in finding that defendants concertedly adopted rules (a) prohibiting refiners from

making resales either open or secret, (b) requiring resale invoices to go to original buyer, (c) prohibiting recognition of customers' resales of unwithdrawn sugar after contract due date, (d) limiting customers' privilege of changing specification and destination after the contract due date even where the refiner was responsible for the delay in withdrawal, (e) requiring buyers to elect and specify at the time of entering the contract the prices and/or terms in cases where the refiner had more than one price or different terms in different or the same territories, and (f) imposing a penalty upon brokers who charged brokerage on resales at a rate lower than the usual commissions on first-hand sales.

95. Because the Court erred in finding that the activities of the defendants imposed substantial restraints on resales by refiners, recognition of resales after contract due date and upon the freedom to vary prices and terms on resales where the refiner had differing prices and terms and thereby imposed undue and unreasonable restraints of trade.

[fol. 411] 96. Because the Court erred in finding that the Code provision as to prior notice of sales of damaged sugar and frozen stocks has remained in effect and that members were expected to observe this recommendation and that the refiners so understood the matter and so notified the Institute; that the notice before sale enabled interference with legitimate sales and was sought and used by the Institute not only to meet charges of arbitrary concessions but to restrict and control such sales and to prevent market disturbances and to preserve the price structure; that defendants agreed without substantial justification that frozen stocks and damaged sugar should not be applied to any contracts not originally calling for them and that damaged sugar and frozen stocks should not be sold except in spot transactions; and in finding that the restraints that defendants imposed upon sales of damaged sugar and frozen stocks were undue and unreasonable.

97. Because the Court erred in finding that the post-Institute decrease in the percentage of the refined to raw price changes is too marked to be explained by the drop in raw prices, and in finding that expert buyers found a lack of sensitivity in refined to raw prices in the post-Institute period, and in finding that in the post as compared to the pre-Insti-

tute period there was a marked increase in margin and a substantial increase in profits.

98. Because the Court erred in finding that the higher level for the price of refined sugar, as compared to that of raw sugar, since the formation of the Sugar Institute, negates the prevalence of free competition.

99. Because the Court erred in finding that there has been maintenance of price level regardless of supply and [fol. 412] demand and a relative stability of prices since the Institute, and in finding that the factors largely responsible for such results are:

First, collecting and disseminating among the refiners while withholding in large part from buyers, the statistical information, this tending at least to stabilize conditions in the industry and aid the individual sellers in their effort to maintain high prices;

Second, the steps taken by the defendants to maintain the uniformity of price structure and thus to eliminate the possibilities of price variations to distributors or ultimate purchasers at any given time and thereby to deprive them of the opportunity, by underselling, to disturb the price structure;

Third, the stabilizing effects of the friendly cooperative spirit which the Institute brought to the industry;

Fourth, the assurance which the open price system under the Institute gave to each refiner that the only prices, terms and conditions he need meet were those openly announced in advance of sales by his competitors.

100. Because the Court erred in finding that defendants had a common purpose to maintain relatively high price levels, and that they were able to and did maintain relatively high price levels through preserving the uniform price structure, withholding statistics from the trade and effectuating the open price scheme.

101. Because the Court erred in holding that the activities of the Institute in examining refiners' records and files, in investigating suspected Code violations and in holding more or less formal trials of refiners in order to determine whether there had been Code violations, consti- [fol. 413] tuted undue and unreasonable restraints of trade.

102. Because the Court erred in holding that the concerted activities and restraints referred to in the findings constituted parts of a general scheme, combination, agreement and conspiracy to suppress competition, to maintain relatively higher prices of refined sugar as compared with the contemporary prices of raws, increased the refiner's margin and profits at the cost of the distributors and the consumers, and unreasonably restrained trade and commerce among the several states and in the District of Columbia.

103. Because the Court erred in admitting in evidence, over the objection of the defendants, the Willett & Gray statistical tables on production, imports, sales, consumption, prices of raw and refined beet and cane sugar and price announcements of the defendant companies contained in volumes from January 1, 1926, to December 31, 1931, of Willett & Gray Weekly Statistical Sugar Trade Journal.

104. Because the Court erred in denying defendants' motion to have plaintiffs' counsel state what part of the above statistical data he relied upon or to strike the documents from the record.

105. Because the Court erred in admitting in evidence, over the objection of the defendants, the testimony of plaintiff's witness King concerning his conversation with a Mr. Wogan.

106. Because the Court erred in admitting in evidence, over the objection of the defendants, the testimony of plaintiff's witness O'Riley concerning his conversation with a Mr. Perry.

107. Because the Court erred in admitting in evidence, over the objection of the defendants, the testimony of plain-
[fol. 414] tiff's witness Brown concerning his conversations with a Mr. W. M. Hall with regard to shipment of sugar f. o. b.

108. Because the Court erred in admitting in evidence, over the objection of the defendants, the testimony of plaintiff's witness Roberts concerning his conversations with certain brokers regarding the elimination of consignment points.

109. Because the Court erred in admitting in evidence, over the defendants' objection, the testimony of plaintiff's

witness Meyer concerning the substance of the telegram received from the American Sugar Refining Corporation without producing the telegram.

110. Because the Court erred in admitting in evidence, over the objection of the defendants, the testimony of Mr. Meyer concerning the substance of a written notice of cancellation of contract without producing the notice.

111. Because the Court erred in admitting in evidence, over the objection of the defendants, a letter purporting to be from Herbert R. Harris, Vice-President of the Savannah Sugar Refining Corporation, to Mr. Albert Pritchard, dated January 13, 1928, without producing other correspondence referred to in said letter.

112. Because the Court erred in admitting in evidence, over the objection of the defendants, the testimony of plaintiff's witness Taylor concerning his conversations with representatives of the Hershey Sugar Corporation.

113. Because the Court erred in admitting in evidence, over the objection of the defendants, the testimony of plaintiff's witness Muller concerning what was done and discussed at a meeting of the Canal Carriers attended by him.

[fol. 415] 114. Because the Court erred in admitting in evidence, over the objection of the defendants, letters exchanged between the Sugar Institute and Mr. Lamborn.

115. Because the Court erred in admitting in evidence, over the objection of the defendants, a file of documents from the files of the California & Hawaiian Sugar Refining Corporation relating to the withdrawal of Fort Wayne, Indiana, as a consignment point.

116. Because the Court erred in admitting in evidence, over the objection of the defendants, letters from Mr. William Tyler.

117. Because the Court erred in sustaining the objection of the plaintiff to the proffered testimony by defendants' witness Cummings with respect to the opinion of the refiners and of the trade as to the fairness or unfairness of the secret concessions or rebates and as to their effect upon the sugar industry generally.

118. Because the Court erred in sustaining the objection of the plaintiff to the proffered testimony by defendants' witness Cummings as to views expressed by the refiners prior to the formation of the Institute with regard to the conditions existing in the industry.

119. Because the Court erred in sustaining the objections of the plaintiff to the proffered testimony by defendants' witness Ripley to explain what was intended by letters from Mr. Ripley to Mr. Bernstein.

120. Because the Court erred in sustaining the plaintiff's objection to the proffered testimony by defendants' witness Petersen as to the practice of retailers generally throughout the country with regard to pushing sales of sugar during the years 1925, 1926 and 1927.

[fol. 416] 121. Because the Court erred in sustaining the plaintiff's objection to admission in evidence of the resolution of National Association of Retail Grocers commending the Sugar Institute.

122. Because the Court erred in sustaining the objection of the plaintiff to the testimony offered by the defendants through defendants' auditors with respect to shortages and discrepancies found in various brokers' accounts, without production of the brokers' records showing such shortages in accounts.

123. Because the Court erred in denying defendants' motion to open up the direct examination of Mr. Place for the purpose of introducing direct testimony on concessions subsequent to the formation of the Sugar Institute.

124. Because the Court erred in admitting in evidence, over the objection of the defendants, legal opinions of Judge Devine with reference to the activities of the Sugar Institute.

125. Because the Court erred in admitting in evidence, over the objection of the defendants, an opinion of Mr. William Tyler, addressed to Mr. Campiglia dated January 8, 1929 concerning certain practices or proposed practices of the Sugar Institute as to uniform terms and contracts.

126. Because the Court erred in admitting in evidence, over the objection of the defendants, a letter from Mr. Frank Lowry to Mr. Frank Sullivan, dated August 22, 1930.

127. Because the Court erred in denying the motion of the defendant, Cuban-American Sugar Company, for a dis- [fol. 417] missal of the petition as to it on the ground that it was not and had not been a member of the Sugar Institute.

128. Because the Court erred in holding, as a Conclusion of Law herein, that in the manner and in the particulars described in the Findings of Fact herein, defendants have engaged in a combination and conspiracy which has unduly and unreasonably restrained trade and commerce in sugar among the several states and in the District of Columbia, in violation of the Act of July 2, 1890, commonly known as the Sherman Anti-Trust Act.

129. Because the Court erred in holding, as a Conclusion of Law, that each of the following agreements and concerted activities on the part of the defendants, as described in the Findings of Fact herein, unduly and unreasonably restrains such trade and commerce in violation of such Act:

(1) The agreement not to discriminate between customers, as described in *Finding 37*;

(2) The agreement openly to announce prices, terms, conditions and freight applications in advance of sales, to adhere thereto until open announcement, in advance of sales, of changes therein, the activities pursuant to such agreement, and the system of reporting and relaying current and future prices, terms, conditions and freight application in aid and as a part of such agreement and activities;

(3) The original restraints upon all repricing of contracts, and the subsequent restraints upon repricing of contracts entered prior to the day of announcement of a price decline;

(4) The collection and dissemination by and among defendants of statistical information regarding melt, deliveries, stocks on hand, stocks on consignment, stocks in transit, and the volume of sugar moved by differential routes, without making such information available to the purchasing trades;

(5) The requirements imposed and persuasion exerted upon non-members and third parties generally in aid and as a part of restraints held by the Court to be illegal;

[fol. 418] (6) The action by defendants to meet, suppress, or restrain contract terms and conditions and freight applications of particular refiners and distributors, in aid and as a part of restraints held by the Court to be illegal;

(7) The requirements imposed upon brokers, warehousemen, customers and trucking concerns to elect one of such functions to the exclusion of others and to cease certain lines of business, and the refusal and threats of refusal to deal with those who do not comply;

(8) The system of exacting pledges and uniform contracts from brokers and refusing to deal with brokers who do not comply, in aid and as a part of restraints held by the Court to be illegal;

(9) The system of exacting non-rebating agreements from brokers, warehousemen and trucking concerns and refusing to deal with those who do not comply;

(10) The maintenance and circulation of lists of warehouses, brokers and trucking concerns, employed or to be employed by refiners, in aid and as a part of restraints held by the Court to be illegal;

(11) The imposition of penalties and forfeitures on brokers and warehousemen in aid and as a part of restraints held by the Court to be illegal:

(12) The fixing of brokerage commissions;

(13) The agreements on transportation charges and freight applications, including Code 3(c), and the activities pursuant and supplementary thereto;

(14) The maintenance of delivered prices and the refusal to sell f. o. b. refinery;

(15) The maintenance and dissemination of the "freight book", the digest of freight applications, selling terms and conditions prevailing among the several refiners in different territories, and the information service relating thereto;

(16) The restraints on transiting and diversions;

(17) Inducing water carriers to agree to carry sugar only on rates and terms openly announced in advance and not to deviate therefrom without like announcement and threatening not to deal with water carriers which do not comply;

(18) The restraints on refiners' private charters;

[fol. 419] (19) The restraints on refiners' participation with customers in pool-car and pool-cargo shipments;

(20) The fixing of switching charges on deliveries from consigned stocks to buyer's warehouse or broker and the restraints upon the absorption thereof;

(21) The elimination, reduction, and restriction of consignment points, reconsignment points, and storage at ports of entry;

(22) The imposition of a service charge on all less than carload deliveries ex-consignment;

(23) The restraints on long-term contracts;

(24) The activities in determining whether and to what extent to relax contract terms and the use of statistics of undelivered contract balances in aid and as a part of such activities;

(25) The restraints on quantity and other discounts which reflect, effect or result in economies to refiners in direct or indirect costs;

(26) The restraints on tolling for customers;

(27) The restraints on tolling for others than customers, in aid and as a part of restraints held by the Court to be illegal;

(28) The restraints on the four-payment plan;

(29) The restraints on split billing;

(30) The restraints on cash discounts;

(31) The restraints on price guarantees;

(32) The restraints on allowances on used bags or customers' bags and on experiments with new types of containers;

(33) The restraints on packing of private brands;

(34) The restraints, with the exception of the requirement that invoices go to original buyers, on resales or sales of second-hand sugar;

(35) The restraints on sales of damaged sugar and frozen stocks;

(36) The Edgar price maintenance agreement;

(37) The requirement that buyers elect between the guarantee form and the non-guarantee form of contract at the time of entering the contract, and the denial to buyers of the privilege of changing from one form of contract or from one destination to another by resale or otherwise;

[fol. 420] (38) The Institute's policing activities, its investigations of suspected code violations, its examination of refiners' files and records, and its trials of refiners and their agents, in aid and as a part of restraints held by the Court to be illegal.

130. Because the said decree entered by the Court is contrary to the evidence.

131. Because the said decree is contrary to law.

132. Because the said decree is contrary to law and the weight of the evidence.

133. Because the great weight of evidence showed that the defendants never fixed or maintained or agreed to fix or maintain a uniformity of price structure among themselves for refined cane sugar.

134. Because the great weight of evidence showed that at all times there had been free, active and vigorous competition among the defendants in the production and sale of refined cane sugar.

135. Because there was no substantial evidence that the defendants or any of them ever combined, conspired or agreed to restrain or have attempted to or did restrain in any manner or by any means whatsoever interstate trade or commerce in refined cane sugar.

136. Because the Court erred in holding that the defendants and their representatives should be enjoined and prohibited, individualy and collectively, in connection with the sale, marketing, shipment, transportation, storage, distribution or delivery of refined sugar, from engaging or attempting to engage, directly or indirectly, with one another or with any competitor, through any program, in

(1) Effectuating any general plan to give the same terms, conditions, or freight applications to customers, re-

gardless of the varying circumstances of particular transactions or classes of transactions or regardless of the varying situation of particular refiners, distributors or customers or classes thereof;

[fol. 421] (2) Selling only upon or adhering to prices, terms, conditions or freight applications announced, reported or relayed in advance of sale or refraining from deviating therefrom;

(3) Effectuating any system for or systematically reporting to or among one another or competitors or to a common agency, information as to current or future prices, terms, conditions, or freight applications, or lists or schedules of the same;

(4) Relaying by or through The Sugar Institute, Inc., or any other common agency, information as to current or future prices, terms, conditions or freight applications, or any list or schedule of the same;

(5) Giving any prior notice of any change or contemplated change in prices, terms, conditions, or freight applications, or relaying, reporting or announcing any such change in advance thereof;

(6) Restraining or preventing repricing, or limiting the period during which or the extent to which a sales contract may be repriced or new prices arranged therefor;

(7) Effectuating any system of gathering and/or disseminating statistical information regarding melt, sales, deliveries, stocks on hand, stocks on consignment, stocks in transit, volume of sugar moved by differential or other particular routes or types of routes, new business or any other statistical information of a similar character, wherever and to the extent that said information is not made, or is not readily, fully and fairly available to the purchasing and distributing trade;

(8) Requiring, persuading or requesting third parties to abide by or conform to any program enjoined by this decree;

(9) Meeting, suppressing, or restraining prices, terms, conditions, or freight applications of particular refiners or distributors;

(10) Requiring or requesting any broker, warehouse, customer, carrier, trucking concern, or any combination

thereof, to elect to perform one or more such distribution functions to the exclusion of others or to discontinue or refrain from any distribution function or to dispose of any business or property interest;

(11) Obtaining, requesting, exacting or attempting to exact pledges or uniform contracts or obligations from any broker as part or in aid of any program enjoined by this decree;

(12) Obtaining, requesting, exacting, or attempting to exact non-rebating agreements from any broker, warehouseman or trucking concern;

[fol. 422] (13) Making or circulating lists of warehouses, brokers, carriers or trucking concerns employed or to be employed by any refiner or competitor, as a part or in aid of any program enjoined by this decree;

(14) Refusing or threatening to refuse to deal with any broker, warehouse, customer, trucking concern, carrier or any combination thereof, as part or in aid of any program enjoined by this decree;

(15) Dealing or threatening or purporting to deal exclusively or primarily with any defined group or class of brokers, warehouses, customers, carriers or trucking concerns, as a part or in aid of any program enjoined by this decree;

(16) Subjecting or threatening to subject any broker, warehouseman, customer, carrier, trucking concern, or any combination thereof, or any agent of any refiner to any loss of business or employment, damage, injury, forfeiture, fine or penalty, as a part or in aid of any program enjoined by this decree;

(17) Determining or restricting brokerage commissions or fees;

(18) Determining transportation charges or freight applications to be collected from customers, or limiting freight absorptions;

(19) Selling only on delivered prices or on any system of delivered prices, including zone prices or refusing to sell f. o. b. refinery;

(20) Restricting routes of shipments;

(21) Making or disseminating at or through The Sugar Institute, Inc., or any other common agency, any freight book or digest of freight of applications or selling terms, or conditions, or supplying information relating thereto, but the foregoing shall not be construed to prevent said defendants from agreeing to report and relay announcements of prices, terms, conditions or freight applications in past and closed transactions through The Sugar Institute, Inc., or a common agency;

(22) Preventing, restraining, or refusing to grant the privilege of transiting or diverting shipments, but the foregoing shall not be construed to prevent said defendants from freely discussing and advising one another as to the most effective means for taking steps individually to prevent fraudulent use of transiting and diversion privileges;

(23) Requiring, inducing, or requesting water carriers to announce rates or terms openly in advance or to agree not to deviate from such announced rates or terms or to agree to not to carry or to refuse to carry sugar except upon such openly announced rates or terms;

[fol. 423] (24) Preventing, restraining or refusing to enter into private charters;

(25) Preventing, restraining or refusing to participate with customers in pool-car or pool-cargo shipments;

(26) Determining switching charges or restricting the absorption thereof;

(27) Imposing service or extra charges;

(28) Eliminating, reducing, limiting or restricting consignment points, reconsignment points, or storage at ports of entry or other points;

(29) Imposing a service charge on less than carload deliveries, or on any deliveries from consignment;

(30) Preventing, restraining or refusing to enter into long-term contracts, or refusing to arrange for deliveries over periods in excess of thirty days;

(31) Submitting contracts or information to the Sugar Institute or any other agency before entering into any contract or sale;

(32) Determining whether or to what extent to relax or change contract terms, or using statistics of unspecified or undelivered contract balances as a part or in aid of such conduct;

(33) Preventing, restraining or refusing to grant quantity or other discounts where such discounts reflect, effect, or result in economies to refiners either in direct or indirect costs;

(34) Preventing, restraining or refusing to enter into tolling arrangements for customers;

(35) Preventing, restraining or refusing to enter into tolling arrangements for others than customers as a part or in aid of any program enjoined by this decree;

(36) Preventing, restraining or refusing to grant the four-payment plan or split billing;

(37) Fixing, restraining or refusing to grant cash discounts, or restricting the periods for which cash discounts are granted;

(38) Preventing, restraining or refusing to grant price guaranties;

(39) Preventing, restraining or refusing to make allowances on containers, used bags, or customers' bags or containers or discouraging experiments with or preventing or restraining the use of new types of containers;

[fols. 424-426] (40) Preventing, restraining or refusing to arrange the packing or selling of private brands;

(41) Preventing, restraining or refusing to make resales of sugar or sales of second-hand sugar, but the foregoing shall not be construed to prevent said defendants from agreeing to invoice resales to the original buyers;

(42) Preventing, restraining or refusing to make sales of damaged sugar or frozen stocks;

(43) Requesting, obtaining, exacting or attempting to exact any promise or agreement from any merchant or distributor to maintain any price;

(44) Requiring buyers to elect between the guarantee and non-guarantee form of contract at the time of entering the contract or at any other time before delivery or refus-

ing to grant buyers the privilege of changing from one destination to another by resale or otherwise;

(45) Engaging in any policing activities or investigating or maintaining any system of investigation, or examining files, records or stocks, or holding any trials, to ascertain or prevent violations of or departure from any program enjoined by this decree.

By reason of the errors aforesaid, the said defendants pray that the said decree be reversed.

Sullivan & Cromwell, Attorneys for said Defendants,
48 Wall Street, New York, N. Y.

Dated: New York, N. Y., December 7, 1934.

[fol. 427] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL AND FIXING TIME FOR FILING PRÆCIPE

This matter having come on to be heard upon the petition of The Sugar Institute, Inc., The American Sugar Refining Company; Margaret A. Jamison and Martha A. Jamison, doing business under the firm name and style of Arbuckle Bros.; California & Hawaiian Sugar Refining Corporation, [fol. 428] Ltd., Colonial Sugars Co., The Cuban-American Sugar Co., Godchaux Sugars, Inc.; William Henderson, Hunt Henderson, Christian J. Gambel and Frederick A. Gambel, doing business under the firm name and style of William Henderson (described in the petition as Henderson Sugar Refinery); Imperial Sugar Company, W. J. McCahan Sugar Refining & Molasses Co., The National Sugar Refining Co. of New Jersey, Pennsylvania Sugar Company, Revere Sugar Refinery, Savannah Sugar Refining Corporation, Texas Sugar Refining Corp.; J. D. and A. B. Spreckels Investment Company, substituted for J. D. and A. B. Spreckels Securities Co. (doing business under the trade name of Western Sugar Refinery); J. F. Abbott, Earl D. Babst, W. Edward Foster, J. P. Cody, M. E. Goetzinger, William B. Tyler, C. B. Newman, George E. Keiser, Jacob Moog, I. H. Kempner, Harry G. Thompson, Louis V. Place,

Manuel E. Rionda, James H. Post, Charles D. Bruyn, William H. Hoodless, Henry E. Worcester, Benjamin O. Sprague, Thomas Oxnard, Alexander Smith, H. B. Moore, Frank B. Sullivan and Fred G. Taylor, defendants herein, upon appeal from the final decree of the Court entered herein on the 9th day of October, 1934 to the Supreme Court of the United States, and it appearing to the Court that all parties in interest are present or are represented in Court, except that Spreckels Sugar Corp., Rudolph Spreckels, W. W. Harper and Edgar H. Stone, co-defendants in the above cause, having been duly notified and requested by said defendants to join in said petition for appeal, have failed or refused to join therein, it is hereby

Ordered, adjudged and decreed that the said defendants appealing are hereby granted the right to appeal alone without joining said co-defendants as appellants; and it is hereby

[fols. 429 & 430] Further ordered, adjudged and decreed that said appeal be and the same hereby is allowed upon the said defendants filing their appeal bond herein in the sum of $500 forthwith, with surety to be approved by the Court; and it is hereby

Further ordered, adjudged and decreed that said defendants present and file a præcipe in accordance with Equity Rule 75 on or before the 5th day of January, 1935.

Dated, December 7, 1934.

Julian W. Mack, C. J.

[fols. 431-434] Bond on appeal for $500.00 omitted in printing.

[fols. 435-437] Citation in usual form, filed Dec. 24, 1934, omitted in printing.

[fol. 438] In United States District Court

[Title omitted]

Order Extending Time—Filed July 9, 1935

Upon the stipulation of the parties hereto and upon the proceedings heretofore had herein,

It is ordered that the return day of the citation and time for docketing the case and filing the record with the Clerk of the Supreme Court be and the same hereby is extended to July 22, 1935.

Dated, New York, July 8, 1935.

Julian W. Mack, C. J.

[fol. 439] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE ORDER EXTENDING TIME—Filed July 9, 1935

It is hereby stipulated between the parties that the return day of the citation and time for docketing the case and filing the record with the Clerk of the Supreme Court be extended to July 22, 1935, and that an order to this effect may be entered without further notice.

Dated, New York, July 8, 1935.

Walter L. Rice (By E. J. McG, p.) Special Assistant to the Attorney General, Attorney for Appellee, Department of Justice, Washington, D. C. Sullivan & Cromwell, Attorneys for Appellants, 48 Wall Street, New York, N. Y.

[fol. 440] [File endorsement omitted.]

[fols. 441-442] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION REGARDING CORRECTNESS OF PAPERS IN TRANSCRIPT OF RECORD

It is hereby stipulated by and between the parties hereto that the transcript of the record includes the original or true and correct copies of all papers designated in the præcipes heretofore filed respectively by the appellants and appellee, except those papers ordered to be excluded from the transcript of the record by the Order Approving the Statement of Evidence dated and filed July 3, 1935.

Dated, New York, July 15, 1935.

Sullivan & Cromwell, Solicitors for Appellants.

Walter L. Rice, Solicitor for Appellee.

[fols. 443 & 444] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 445 & 446] IN UNITED STATES DISTRICT COURT

Narrative Statement of Evidence

WILLIAM W. GARDINER was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am a sugar statistician and publisher of the Willett & Gray Weekly Statistical Sugar Trade Journal. It is a journal that compiles statistics for the whole sugar trade throughout the world. It deals with the question of price production, sugar tariff laws and everything connected with sugar trade except the technical. It has been in existence 65 years and I have been the main statistician for 40 years.

I collect various information contained in the Trade Journal. I start off with the price of raw sugar, keep in contact with the market and find out where sales have been made. The same procedure is followed with refined sugar. World cables and telegrams are received concerning the crops and everything along that line which has any information worth publishing. Practically all the important sugar people throughout the world are subscribers to Willett & Gray. There are no other trade journals that purport to cover the same type of statistical information. [fol. 447] We have always heard our Trade Journal was the highest authority in the sugar trade.

Practically every page in the 1927 annual report of American containing statistics uses Willett & Gray's.

Petitioner's Exhibits 1 to 7, inclusive, were received in evidence.

Every year we make up what we call a table of consumption of sugar in the United States. We have a very elaborate table in which we go into every possible detail that can be given that would be of interest to the trade. On page 16 of Exhibit 3, American, instead of taking the figures

actually given here, on the same basis as the figures we give, says consumption of Cuban is 2,913,898 tons or 54.99%. These percentages are not figured by me but they are approximately correct.

The diagram for 1929, Exhibit 7, is the consumption sheet. These figures came from Willett & Gray. I have verified them and know they are correct. These figures, although called consumption figures are actually meltings by refiners and are correct. If refiners build up large stocks in their warehouses the figures do not represent deliveries [fol. 448] for actual consumption.

We get the reports from the refiners themselves of all of the raw sugars they purchase and where they purchase them. We check from Government reports, through Custom House reports and through importers of sugar who sell to the refiners. I consider them reasonably exact. Reports are also obtained from the refiners in Louisiana, from Puerto Rico and elsewhere. The exports are deducted as far as the United States sugar consumption is concerned. Some years they are quite important.

Weekly, monthly, semi-annually or, at least, yearly, the refiners give their figures of meltings. In 1929 the percentage used and consumed in the United States coming from the Island of Cuba was 3,014,594 tons or 51.88%. (Other countries with their percentages were also stated.) Domestic beet was 856,640 tons or 14.74% of the total.

Willett & Gray's Trade Journal is published weekly. I am constantly in communication in New York with refiners, importers and brokers and everybody connected with the trade. We have an extensive organization of representatives throughout the world who give us cable information regarding world crops.

Refiners post their prices in their salesrooms, which we [fol. 449] watch. Very frequently when they make a change they call us up and tell us. Our information always comes from the refiner himself. I discuss conditions with other brokers and gauge the raw sugar market. If it is strong I look for higher prices and vice versa. Nearly all refiners in the United States send us telegrams of their changes. I have personal contact with New York refiners and communications with out-of-town refiners by telegram, telephone and letter. The information is submitted voluntarily.

The price and volume of raw cane sugar reported in this country comes from reports of refiners. We check the information with Custom House reports and also with the importer who sells the raw sugar to the refiners. As far as possible we carry complete information as to all of the cane sugar imported into this country.

We have been compiling what we call "consumption figures" for the United States for a great many years. The figures which consist partly of deliveries and partly of meltings are referred to in the trade as meltings or deliveries. They come from the refiners, the beet sugar factories and, in the case of off-shore sugars, from Custom House records [fol. 450] and importers. All refiners give us their melting figures and about 1/6 give us their delivery figures. We consolidate these figures and call them "consumption figures". The figures for beet sugar consumption are for actual deliveries.

Petitioner's Exhibit 8 was received in evidence.

Page 19 of Exhibit 8 contains a compilation of all sugar imported into the United States as well as domestic production.

The melting figures are all given in raw value which we reduce to refined by using 107 pounds of raw to 100 pounds of refined. For statistical purposes 107 pounds of raw sugar 96° is considered the amount necessary to make 100 pounds of refined sugar.

In the table on page 31 at the top of the second column we give the latest quotation of refined sugar. It is the price subject to a discount. We call it the "list price as of January 14". The figures are obtained from the refiners' salesrooms. If we had not heard anything to the contrary we naturally assumed out-of-town prices were unchanged from previous advices. All the quotations of the refiners' prices in the various issues of Willett & Gray from Jan- [fol. 451] uary 1926 to the present are obtained entirely from the refiners.

Petitioner's Exhibits 9 to 13, inclusive, were received in evidence.

The figures appearing on the marked pages in Exhibits 7, 9, 11, 12 and 13 purport to have been taken from Willett & Gray.

We have the price quotations, not the regular statistics, on the sales of refined beet sugar. They are obtained from the beet factories chiefly by telegraph. The Trade Journal undertakes to report the entire production of raw cane and beet sugar throughout the world. The information in those tables is obtained from an organization which sends us information we can depend on. We have well-known correspondents throughout the world in sugar producing countries. Statistics contained in the Trade Journal have never been questioned as to accuracy by any of the defendant refiners and they have been used extensively.

Mr. Rice: If your Honor please, I should like to read an excerpt from Higgins' statement regarding Willett & Gray.

"I should explain to your Honor that the Willett & Gray statistical organization is one of the largest, if not the largest, in the business.

"Its business is to sell sugar statistics to the trade. It gets out regular publications and notices with trade facts of the prices of raw sugar, sales of raw sugar, prices of refined and sales of refined, and such additional [illegible] as it is able to procure of prices, not only in the American market but in other markets.

"It procures prices of beet sugar crops, of beets, the production of beet sugar, and the production of refined sugar and off-shore sugar.

"It is the recognized, largest and standard statistical organization in the business and in what I shall have to say about the Willett & Gray margin figures, which play so large a part in the psychology of counsel of the Government, and their attitude toward this case, I do not mean any reflection upon the accuracy or integrity of the Willett & Gray organization, because the refiners constantly refer for one purpose or another to these figures, but in doing so the refiners familiar with the business and the brokers and others in the business who are really familiar with it recognize the fact that the so-called Willett & Gray apparent margin is a false and misleading margin, not because Willett & Gray do not do the best they can in order to produce reliable figures and statistics on that matter but because the statistics and the facts upon which they could make accurate statements of the margins, are simply not available to them."

Petitioner's Exhibits 14 to 19, inclusive, were received in evidence.

The refiners' announcements quoted on page 34 of Exhibit 16 were obtained directly by us from the refiners in-
[fol. 452] volved. Such announcements are printed on small slips of paper and posted on the bulletin board in the refiners' sales offices. Copies are generally given to us.

Refiners' margin is explained as follows: We introduced in our publication a new calculation which we did not say was refiners' margin. We always called it Willett & Gray's margin or Willett & Gray's difference between raw and refined sugar. We never claimed it to be anything else and we have frequently commented on it. At page 18 of our circular of January 14, Exhibit 8, we made the following remark about the sugar consumption in the United States:

"As a matter of fact it would hardly be fair to say that refiners have actually averaged in their operations a margin of this size. While they operated during the past year on smaller stocks of raw sugar than usual during a large part of the period, they must anticipate raw supplies in advance of market changes in refined sugar. Refined sugar is, of course, not sold in heavy volume except on a relatively small number of days during the year on which there is an important change in prices, so that the daily average of raw and refined sugars which is not weighted does not truly represent an actual average price paid by refiners for raw sugars during the year nor the actual average price received by them for refined sugar sold during the year."

There is a small difference between raw and refined sugar and, as such, it is an interesting piece of statistical information. It is the custom of the Trade Journal to make statis-
[fol. 453] tical tables of the Willett & Gray margin but not to chart it.

In Exhibit 8 we have a table of the average difference between granulated and centrifugal sugar for 10 years based on our own quotations.

Cross-examination.

By Mr. Higgins:

It has never been the claim of Willett & Gray nor my claim that the so-called Willett & Gray figures represent

either the actual profits or gross margin of the refiners or any approximation to that profit or gross margin.

The principal reason our margin figures do not represent approximation even of the gross margin or any measure of the net margin is because our figures are not weighted as to the volume of sales of the refiners on the various days represented in our margins nor as to the volume of purchases of raws.

The raw prices we state from day to day in our daily circular and in our weekly journal are prices I personally have obtained by inquiry in the trade down at the docks and at the refiners' offices and from sugar traders and at the Exchange on such transactions as I could learn about. [fol. 454] We frequently received private information regarding sales and purchases of raw sugar that are not made public.

Our daily sugar Trade Journal of January 8, 1932 states the price of 96° centrifugal raw on that day to be 3.15. That has no relationship at all to the market quotation of the Exchange, which does not deal in spot or prompt sugars. The daily prices of raw sugar, which form the basis of the Willett & Gray margin as published in our Trade Journal, are not based entirely upon the raw price which we announce from day to day because frequently after we go to press some changes are made which would materially alter this quotation. Sometimes we have to go back 2 or 3 days.

The daily reports are checked and corrected in the weekly reports which are again checked and corrected in the annual reports.

The sales of raw sugar on any given day are not always at the same price. Sometimes weeks will pass without any change in the quotation. In markets like the present, which are weak, we have 3 or 4 quotations in one day. An ordinary sugar market will go along 4 or 5 days at the same price. It depends on the state of the market.

[fol. 455] If there is tension and contention among the dealers there is a great deal of bargaining as to what the individual deals will be made at. It is not difficult to get information about deals and prices at which they are made. To a great extent all the refiners willingly tell us what prices they have paid on any given day. It is for their own benefit for them to have these things accurate and correct.

I check the figures the day our dailies are published and the following day I obtain the information both from the

refiners and sellers of raw sugar. The refiners keep us posted for the additional reason that they use the figures for certain transactions of their own.

When I find on a given day that there have been transactions in raw sugar at 3 or 4 different prices I use an average for that day for the purpose of a subsequent calculation of the Willett & Gray margin of raw prices. For our daily figure we use the last sale. For private records the quotations are averaged. The private records are those we keep [fol. 456] in order to state the raw prices on that day on which Willett & Gray margin is gotten out. The average is not weighted by number of pounds or tons of the purchases at the different prices. It is an arithmetical average of the different price- at which sales have been made. Our refined price is based on the lowest quotation at which a buyer in good standing might purchase the equivalent of a carload of sugar. It is true and has been true throughout the period from before 1925 until the present. Our raw sugar prices are not weighted because I have always gone on the principle that during the course of the year the weighting would average itself up. For the purpose of determining the margin I take the lowest price at which refined sugar is sold each day, which figure is the most favorable to the refiner in reducing his margin of profit.

As far as I know from my contact with the trade, refiners get no discount on the quantity of raw produced. They have to pay as much for a whole cargo of 50,000 tons as if they bought a few hundred sacks, provided the market is steady. I have seen transactions of 5,000 tons and 50,000 tons both sold at the same prices in a steady market.

The Willett & Gray refined price which is used by us in [fol. 457] the calculation of the Willett & Gray margin is the lowest price at which a buyer in good standing can get a carload of refined granulated sugar. Most of the time the prices of all refiners are the same, but occasionally one is lower than others. I cannot describe offhand what these occasional variations were or what refiners were involved in these variations but I would say it might be one in New York, Philadelphia or Boston. At various times there has been keen competition between the refiners. A few years ago Federal, Arbuckle and Revere were in very keen competition in Boston and their prices were lower than those quoted in the New York market.

The selling price of refiners is fixed f. o. b. the refinery. Differences in freight rates from the various refineries are largely equalized by freight absorptions. On the occasions when there were differentials in price the variation was from 5 to 20 points. The price in New York and New England was always the same. The difference between a higher and lower price existed less than 10% of the time. I would prefer to say it existed occasionally and that such occasion was an unusual situation. I do not know except [fol. 458] from hearsay that in years before the Institute the refiners' published price was not always their usual price to the ordinary buyer in good standing.

In the years before the Institute we took the general posted prices of the refiners which was the basis on which contracts were made. We had to take that because there was nothing else. I gave no effect to what I heard reported orally as to the concessions that the buyers might get under the published price.

From my contacts with the trade it was my idea that in the time before the Institute refiners did exercise some latitude in selling at prices other than their published prices, but I did not have sufficient proof to use such information.

I cannot, from my knowledge of the sugar trade generally and the financial reports, say if there was any close relationship at all between the size of the Willett & Gray margin and the net profits of the refiners. I have never connected the finances of the organizations with our statistics in any way. So far as we are concerned there seems to be no connection between the Willett & Gray margin and the actual net financial results or profits of the refiners in any given periods. We never thought of making such a [fol. 459] comparison. We kept out of the financial end.

Defendants' Exhibit A was received in evidence.

It is my information that the sales in volume take place on the day an advance in price is announced by the refiners so that the buyers come in and buy at the old, the lower, price. Sales that take place at the advanced price, if any, are merely the minor spot sales from day to day of people who come in and may want a few bags or a carload of sugar. All the purchases are concentrated during the year into 9, 10, 11 or 12 so-called moves, with purchases concentrated on the one day.

We publish each year the Willett & Gray average margin for that year. We call it the average difference between granulated and centrifugal. In the calculation of this annual average difference we give the same effect to the price on a day when no sales take place, as on a day when 95% of the sales for that given month are made.

Mr. Rice: I state for the record that the petitioner has not intended to make any reference to such an annual average margin.

On the days of the year when some refiner's price was lower than others we gave effect to the lower price, calculating the differences between the raw and refined price. For the price of raw sugar we use an arithmetical average [fol. 460] of any varying prices at which sales took place on a given day. All refiners' published prices were the same during 90% of the time. Raw prices were of practical monetary importance to the refiners so it was important for them to make sure that our prices were accurate and they willingly gave us the information about the raw prices. Conditions are such that it is difficult for a seller of raw sugar to know what price to accept for his product. He makes a contract "price day of arrival" or a 10-day price of arrival.

Our figures on sugar consumption are partly melt and partly deliveries. All the refiners have always reported their melt. Most of them do it weekly, some monthly, some semi-monthly and some yearly. Federal and Arbuckle used to report yearly. For a great many years we have been publishing what we call semi-annual consumption figures of the smaller refiners and as I can get a close estimate of their melts I do not have to get their reports weekly. The consumption figures are not based on our estimate of the melt of the smaller refiners because I get the final figures for the year from all of them. To obtain delivery figures, which we call "consumption figures", we added the receipts of raw during the year to the stocks on hand at the first of the year and subtracted the stocks on hand at the [fol. 461] end of the year.

I make the calculations as to deliveries on the information given by the refiners. C. & H. and Western give me deliveries. The others give me melt. The consumption

figures of C. & H. and Western ran between 700,000 and 800,000 tons out of a total of 5,400,000 tons in 1931. Approximately 85% of my figures of annual consumption is the melt of refiners in the United States. Stocks of raw and refined sugar at the end of a calendar year are practically at their lowest, hence those melt figures give us a very accurate idea of sugar deliveries.

In a good many years stocks of raw and refined at the beginning and end of the year are approximately the same. A good many times they are not. Our consumption figures wouldn't necessarily be a close approximation of how much sugar had been bought by the people of the United States in a given year.

In addition to refined cane sugar we included all beet deliveries and off-shore sugars. Our melt figures are for 85% of the refined cane, not 85% of the entire consumption. For the last 4 or 5 years we have received from the beet people their actual delivery figures, that is, their actual sales. We get such information as we can from the largest beet producers and estimate the rest.

[fol. 462] We began to collect the statistics in 1928 after the Domestic Beet Sugar Bureau was organized. Before its organization we got information from the largest of the beet factories. We also went to the largest brokers. The beet companies that gave us their deliveries before 1928 were Great Western, Michigan and American Beet, who sold 50% to 60% of all beet sugar. The rest was estimated proportionately. The estimate was generally accepted as correct.

We obtained the Louisiana figures from various people connected with the Louisiana trade and several of the domestic refiners. We have known all the arrivals of Louisiana sugar that went to refineries and were informed as to the balance of the crop. Off-shore sugars are obtained from Cuban sources, Custom House reports and people who manufacture the sugar and sell it.

The calculation and publication of prices for the year 1928 was made the first week in January of the following year. We published a table showing the daily raw and refined prices during the preceding year and then a statement of the Willett & Gray difference between raw and [fol. 463] refined prices which represented a summary of those figures.

(Referring to page 27 of Exhibit 17:) When we found 2, 3 or 4 prices of raw we took an arithmetical average of those prices in stating what the raw price was for that day. On the bottom of the centrifugal table is the yearly average total. It was 4.229 for 1928. If the figures given in the tabular form are added they will not average that because it was not done by number of days. Sometimes the daily prices that we publish in the accumulation of the daily prices for the preceding year are the averages for each day. It depends on the trend of the market. If the trend is upward and there were 3 or 4 sales we would use the higher quotation. I want to emphasize the fact again it is not included in this average quotation which is given here because in making the calculation at the bottom of the page we have used an average on individual days when there have been several transactions at different prices. The raw sales prices were the prices of all of the transactions on the raws that we were able to learn about and I think we learned of most.

I would say that information regarding 50% of all raw sugar purchases is publicly available and that we obtain, [fol. 464] through confidential sources, information regarding an additional 30%. This confidential information is included in our annual compilation. There is no way to determine upon any statistics or figures which we publish or which have been included in these volumes introduced into evidence, the basis of the annual statement of our prices in any year. We gave the same weight in our calculation of our arithmetical average on a given day to the confidential figures that we gave to the published figures when we prepared our annual figures. We obtained such confidential reports from American, National and Arbuckle, who purchase offhand, 75% of the raw sugar purchased by all the Defendants. I am confident I could get any information I wanted from McCahan, Pennsylvania, Revere, Savannah and Godchaux, but I do not remember any instance where I actually did get such information from these refiners.

I am confident from my knowledge of the men with whom I spoke that they gave the correct and full figures and disclosed all of their transactions. They would, in my opinion, absolutely give me the figures for their purchases of raws at the highest prices that they paid.

Practically all beet sugar is made in one process. That is why production and manufacture is practically one thing. All domestic beet sugar is manufactured in this country. The crop is harvested principally in October and from a crop of 900,000 tons, 700,000 tons would be carried over to the next year. It takes 90 to 100 days to manufacture the year's crop into beet sugar. It takes fully a year and sometimes more to get rid of the sugar manufactured in 90 or 100 days.

Before the formation of the Beet Sugar Bureau we obtained information regarding consumption of beet sugar [fol. 465] from the bigger companies. The rest was estimated. Our beet sugar consumption figures were based on actual delivery figures furnished by the larger companies.

The Mississippi Valley territory, commonly known as the guaranty territory, is the big beet sugar market. We give quotations when we receive them from Michigan-Indiana territory and the Mountain and Pacific Coast States.

The differential between beet sugar prices and refined cane sugar in the Mississippi Valley is usually 20¢ per 100 pounds. It varies but not frequently. It has varied as high as 35 points and as low as 10.

As far as the Pacific Coast territory, I do not know the differential. The differential in the Mississippi Valley has existed as long as I can remember—about 20 years. I have noticed no change in the commonly prevailing differential between beet and cane sugar since the Institute was organized.

We do not publish tables that purport to show the quantity of sales. We publish what we call crops of the world and every week sales that are received from week to week of raw sugars. We publish sales of raw sugar but don't tabulate or add them up. We publish no compilations of the purported sales of refined sugars.

[fol. 466] Redirect examination.

By Mr. Rice:

Figures published in Willett & Gray on refined cane sugar before 1928 would not include quantity discounts, concessions made by the refiner to a particular customer, absorptions by way of guaranty given by the refiners to

the customer, warehouse charges absorbed by the refiner at the point of destination, or any concessions or any rebates made by the refiner. We only took off the 2% discount generally allowed to the trade. We put the net cash figure in our price, deducting 2% from the gross figure given us.

If we did compute the amount of quantity discount, the concession and absorptions, the quotation on refined cane would be lower and the margin of the refiner prior to 1928 would be smaller than indicated in Willett & Gray. In investigating the prices of raw sugar purchased by the refiners from importers I interview the sellers as well as the purchasers. Sometimes one is enough. I see the sellers each day. There are about 20 importers of cane sugar in New York and I have contacts with all of them. We attempt to cover all of the large sellers of raw sugar. I know of no trade journal or statistical source which covers information on prices, imports, production and sales to the extent Willett & Gray does in the Trade Journal.

Prices of Cuban sugars in bond and for future delivery [fol. 467] are quoted on the Coffee and Sugar Exchange. I should say that 200 members of the Exchange use our figures on raw sugar. They are on file there and the Exchange subscribes to our publication. I know of no motive a refiner would have in not telling me the top price he paid for raw sugar or why he might want to boast this top price or boast of the price paid for raw cane. If raws went up high enough it would indicate an advance in the price of refined. The price of raw goes up slowly and the buyers of refined sugar commence to watch the situation and when it looks as if it was too high for the refiners to maintain their cane price, they commence to buy the sugar.

If the price of raw sugar, duty paid, was $4.00 per hundredweight and the price of refined cane $5.30 a hundredweight, and it was learned that American made a large purchase of raw at $3.75, they would notice that the raws were so much below the refined that they would be looking for a decline in refined sugar and to some extent it would stop purchasers of refined sugar.

Recross examination.

By Mr. Higgins.

Public knowledge of the fact that a refiner had purchased raw sugar at a figure slightly above the generally [fol. 468] known price would have no effect on the price of refined sugar. However, such information would encourage raw sugar sellers to raise their price and the dissemination of such information would thus have a direct and prejudicial effect upon the refiner.

[fol. 469] FRANK C. LOWRY was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I have been president of National Biscuit Company since June, 1931. I was in the wholesale business from 1897 to 1900 when I came to New York and went with the importing and exporting firm of Smith & Shipper. In 1902, C. A. Spreckels organized Federal Sugar Refining Company and Smith and Shipper became their purchasing and sales agents. I became general manager of Federal in 1904 and continued in that capacity until 1920 when I withdrew and joined Atkins & Company. At the same time we made arrangements with the Pennsylvania Sugar Company of Philadelphia to operate their refinery under a tolling arrangement which continued until 1927. In the early part of 1926 the Atkins firm was dissolved and succeeded by Lowry & Company, Inc. I was a partner of Atkins and president of Lowry.

Atkins, and afterwards Lowry, acted as agents for various raw sugar prolucers of Cuba, Puerto Rico and the Philippines. This company had a refined sugar department which sold sugar for refiners to grocers and manufacturers throughout the country. It had a futures department that operated on the Sugar Exchange and also a [fol. 470] department that operated in raw sugar.

The transportation department engaged freight for the transportation of raw sugars and had experience in moving

refined sugar from New York to Chicago by way of the New York Barge Canal and the Great Lakes.

Raw sugar is unloaded from steamers at the refiners' docks and goes into the refinery where a clarification process continues until a white refined sugar is produced. The price of raw sugar is based on delivery to the refiners' wharves, that is, the price in New York plus freight charges from the shipping point to destination. The buyer pays the duty and usually the insurance. Quotations are in dollars and cents and are based on 100-pound quantities.

At the refinery raw sugar is melted and run through filters until it is pure and tests practically 100%. Then it is grained and put into bags, cases or cartons for sale to the trade. The refiners have numerous types of packages and different quantities within the bags or packages. The price basis of refined sugar is the 100-pound bag.

"Domino" is a trade name American gives to its product. "Jack Frost" is the trade name used by National. Both are heavily advertised. Other defendant companies [fol. 471] advertise their own brands but not as extensively as American and National. The purpose of advertising is to bring down sales resistance. Sugar is very standard in quality and it is rather difficult to get the customers to call constantly for any particular brand. There is no doubt that in certain sections one brand or another has the call. All the refiners have various alternative modes of transportation—truck, rail, water and water-and-rail.

New Orleans refiners use the Mississippi River. The Warrior service is a Government line which operates on the Warrior River in Alabama. Boat service transports sugar to the North. From the termini of these barge lines sugar is transported to northern points by rail.

Because the water rate is cheaper than the rail rate, C. & H. and Western ship a quantity of their sugar through the Panama Canal and up the Mississippi and Warrior Rivers. These two companies also sell west of the Rocky Mountains.

The main arteries of water traffic in the eastern and northern sections are the Hudson River, the New York Barge Canal and the Great Lakes. A considerable quantity of sugar going to the Chicago region moves over that route.

[fol. 472] Revere distributes its sugars in New England but their overages they send west by rail to New York State and the northern parts of Ohio and Indiana. Some of the refineries in the vicinity of New York City ship by boat to Norfolk and thence inland by rail. The New York refineries sell in Wisconsin, Minnesota and the Mississippi Valley. They do some business as far west as the Missouri River but for the most part sell east of the Mississippi. The refineries at Baltimore, Philadelphia and Savannah sell in the same territory that the New York refineries do. The New Orleans refineries sell in Middle West territory as far east as Ohio and as far west as Kansas, Missouri and Oklahoma.

Petitioner's Exhibits 20 to 27, inclusive, were received in evidence.

All defendant companies store refined sugar at their refinery warehouses and ship sugar for storage in warehouses located at ports or other termini and at consignment warehouses in cities throughout the country. Sometimes they ship to consignment points throughout the country for later distribution to the trade and at times to transit points where it can be forwarded to some other [fol. 473] point. In interior points the refiners use public warehouses which they do not own or manage. Sugar at the consignment warehouses is delivered in carload or less than carload lots. Refiners prefer to do business with a public warehouse.

A broker's duties are to negotiate between the refiner or seller and the buyer for the sale of sugar. Ordinarily, the purchaser signs a contract presented by the broker and it is forwarded to the refiner where it is accepted and, pursuant to the contract, the sugar is placed for movement.

Raw sugar producers generally have agents who act as brokers and who do not participate in the sales of refined sugar. In cities where the refinery is located a broker who negotiates a sale of refined sugar receives a commission of 3¢ per bag of 100 pounds. On sales outside of the refinery cities the broker's commission is 5¾¢ per bag unless a sub-broker participates in the sale, in which event the commission is 6¾¢.

The business of the refiner is done through brokers who frequently act as the representative of a particular refiner.

Some brokers sell sugar for any refiner. It is the practice [fol. 474] of refiners to operate in a particular market through a single broker. Sometimes business is done with the consumer through salaried agents of the broker. Some brokerage companies have engaged in the transportation business either as principal or agent, though this practice is not customary.

Frequently wholesale grocers buy in a low market more sugar than they would ordinarily use in their own business of selling to retailers and retail that sugar to other wholesalers in competition with sugar sold by the refiners. Some dealers handle sugar alone, buying when they think the market is right and storing in public warehouses if necessary. They are interested in the resale.

Lamborn & Company are sugar brokers representing some Cuban producers who refine sugar in Cuba. L. W. & P. Armstrong are brokers in raw and refined and represent the raw sugar producers of Puerto Rico. Lamborn represents Savannah and probably does business with most of the defendants.

The Hershey Company owns properties in Cuba and has a refinery there. They ship the refined sugar to the United States and sell it through their representative, Pike & Company of New York.

The Cuban American Sugar Company has a plantation and a small refinery in Cuba. It does business in raw [fol. 475] sugar, selling to refiners in New York. It likewise ships refined sugar for distribution direct to the retail trade. It controls the Colonial Sugar Company.

The 4-payment plan was adopted by the refiners for the purpose of making payments easier for customers. Under this plan the refiner gives the customer the privilege of paying for a car of sugar in 4 instalments, a week apart. It is used mostly in communities where the wholesale grocers are small and economic conditions are poor.

Ordinarily sugar is sold on a 2% cash discount basis, the payments being due 7 days after the sugar arrives at destination and is delivered to the buyer. Full payment is due 30 days after delivery. Sugar is sold on such a close margin that it is necessary for a buyer to take the 2% discount. The margin of profit for the ordinary grocer runs from 5¢ to 20¢ per bag.

The guaranty against price decline is used in the West and Middle West. The buyer receives the benefit of any lower price which may be named between the time the original contract is made and the time sugar is delivered to him. If the market declines, the buyer has the privilege of withdrawing sugar not previously withdrawn against a contract at the lower price. Price guaranty is a change- [fol. 476] able thing. Sometimes sugar is sold without a guaranty and sometimes it is sold with a guaranty against decline until the expiration of the delivery privileges guaranteed by the contract.

Sugar is generally sold on a prepaid freight basis. It is billed to the buyer on a delivered price basis which is made up of the basis price plus the prevailing rate to the point of destination.

Sugar shipped by rail and water instead of rail only is shipped by what is known as a differential route. A large percentage of the time the prepaid basis charged by the refiner on deliveries from consignment points will be based on the lower rate to that point irrespective of how the sugar is shipped. If it is shipped by all-rail the refiner absorbs the differential.

From a credit standpoint the payment on sugar is due so many days after it is delivered to the buyer. The matter of routing is unimportant. The period when payment is due depends on time of arrival and is later if the shipment is made over a water route.

The purchaser, in ordering sugar for direct shipment to himself, may stipulate the route. If he does so, he does not receive the benefit of a differential rate. If he orders [fol. 477] all-rail he may in addition lose the extended period of credit that a longer shipment would take.

Prior to the organization of the Institute in January 1928 a purchaser could frequently buy sugar for delivery more than 60 days in advance. For a long period manufacturers purchased in this manner. The grocery trade bought for 30-day delivery and during and after the war those terms became less customary. During the period directly before the Institute was formed the period for delivery was a matter of negotiation. If a purchaser wanted a period for more than 30 days it might or might not be extended by the refiner with whom he was trading.

Manufacturers would want a supply of sugar for more

than 30 days in advance because their sugar was not for resale but for use in their business. They did not watch the market conditions as closely as others in the trade. They preferred to base the price of their finished product on the price of the raw material and to know that they would have it for a definite period. In using this method they sometimes gained and sometimes lost.

Since the formation of the Institute the contracts of National Biscuit call for delivery within 30 days. When the 60-day period was withdrawn the company protested [fol. 478] just as other manufacturers did.

Raw sugar costs 1¢ a pound plus a 2¢-duty. The total cost is 3¢ and, if 7 pounds are lost in the refining of 100 pounds, the loss involved is 21¢.

National Biscuit manufactures and distributes crackers, cakes and cookies. They have 70 manufacturing and distributing plants located over the country. National Biscuit purchases its sugars from many of the eastern cane refiners and beet sugar producers, and also from C. & H. and Western.

As far as purity is concerned beet sugar and cane sugar analyze pretty much the same. Both test very close to 100% pure and for many purposes are identical. As a rule beet sugar sells 20 points under cane. The practice has grown up in the trade and has prevailed for many years.

National Biscuit uses as much beet as cane sugar. Its annual requirements are around 750,000 bags. Any of the refiners could supply the entire amount of sugar it wanted to all of its factories but there would be great difficulty by reason of location. A refiner located in Boston could not profitably furnish sugar to the plants of National Biscuit in New York and Philadelphia. A large percentage of our production is in reach of the refineries of American because it has plants in New Orleans, Baltimore, Philadel- [fol. 479] phia, New York and Boston. I believe it would be of economic value to the American if it had a call on all of our business.

National Biscuit has an advantage because practically 100% of its sugar is shipped directly from the refinery or beet sugar plant to its own plants in carload lots and no handling expense is involved. Fewer notices would be

rendered and no public warehousing at the consignment point would be necessary.

Prior to the organization of the Institute when I represented Federal and Spreckels I frequently cut prices for National Biscuit. In my capacity as a seller of sugar I made open reductions to everyone. The announcements were posted in our salesroom. I might make an arrangement with National Biscuit to give them longer than 30 days, without giving the same thing to other buyers, because of the volume of their business.

In cities where refineries are located the refiners do not customarily make deliveries in less than 100 bags on a single delivery. They make an exception in the case of large chain stores and make small deliveries to the stores belonging to the chain. In a city where there are no refineries but where there is a consignment stock in a warehouse, [fol. 480] refineries will issue orders for small quantities such as 25 or 50 bags, or for large quantities. In those cases the refiner does not make delivery to the buyer but the buyer sends his own truck.

It is the practice of National Biscuit to order sugar shipped to its own plant in carload lots for the purpose of avoiding trucking expense. A large portion of its business is done in carload lots.

Expenses of a refiner in handling sugar in consignment warehouses consist of storage insurance, labor in and out and damaged sugars. These expenses vary according to the conditions in different cities and different warehouses. Storage and handling for the first month each costs about 3¢ per bag.

The practice of returning second-hand bags to the refiner was never general. When operating Pennsylvania I noticed the bags were going a short distance and being unloaded at National Biscuit's plant. I thought if these were carefully opened and the sugar dumped and the bags baled and returned to us in good condition we could use them again. I made arrangements with National Biscuit to buy these bags from them at the same price as new bags because for our purpose they were equally as good as long as they were [fol. 481] satisfactory to National Biscuit. This idea which originated with me was not offered to anyone else because I did not know of any other customer with whom it could be handled in such a clean way. Since a bag could be used from 5 to 7 times and cost 15¢ a piece, the average cost was

2¢ to 3¢ for each time used. It would be impractical for the grocery trade to return the bags to us. I know of no cases where this method was used for rebating. The practice became general. American, Pennsylvania and the beet sugar companies did it for National Biscuit. It was not done to meet competition because it was done in places where we did not compete. The practice continued for a number of years until stopped by the Institute.

When I was in the sugar business I made an arrangement with Hedger Transportation Company in March 1929 to transport sugar from New York to Chicago by water. At the time the refiners had not been using this cheaper method of transportation. They were shipping mostly by lake and rail into Chicago. By purchasing f.o.b. New York and shipping sugar to the lake ports by this route it could be delivered at less than the refiners were charging. We followed this plan for our clients and also moved sugar for Spreckels and C. & H. on the same basis. C. & H. wanted to have their sugar shipped to Chicago by water because it was less than the all-rail route from San Francisco to Chicago. We used this saving mostly to meet competition.

Lowry transporated the sugar from Yonkers to Chicago [fol. 482] for 29¢ and paid for the loading, unloading, storage and warehousing in Chicago. We transported sugar for the refiners to Chicago and charged them 35¢. This 6¢ difference over the Hedger rate was to cover expenses and allow us a profit. In some cases we assigned our Hedger contract to the refiner on a payment of 2¢ per bag profit. The arrangement resulted in sugar being transported to Chicago for Spreckels at 36¢. The usual rate in Chicago for deliveries from the warehouse was 45¢ so the refiner made the difference between 36¢ we charged and the 45¢ which the refiner charged the customer.

At one time we made the arrangement with the Chicago Powdered Mills, a buyer, who kept the profits or used the difference to obtain more business.

We were paid for the advantage of our contract, the obligations we undertook and the services we rendered. Full disclosure of our arrangement with Hedger was made to the refiners. The arrangement was not used for rebating. With the exception of Chicago Powdered Mills, the contracts with Spreckels and C. & H. were advantageous to the refiner. The agreement lasted until October 29 when

navigation closed. We did not move nearly as much sugar as we expected because Spreckels was not able to ship the amount anticipated. I do not recall that Spreckels said anything about Judge Ballou or anyone else connected with the Institute in regard to the falling off of shipments. [fol. 483] Petitioner's Exhibits 28 to 31, inclusive, were received in evidence.

Cross-examination.

By Mr. Higgins:

The territory in which a refinery does business fluctuates. It would prefer to do all of its business in its home town if that were possible. It expands its territory in accordance with its necessity for increasing sales. The further it goes the less attractive business becomes. From time to time the refiners have changed their sales territory. Both before and since the Institute, the localities in which they actively compete expand and contract with varying market conditions.

The terms in the contract for the selling of sugar give the buyer 2% cash discount if paid within 7 days, and full payment in 30 days, but as a matter of practice when operating Federal and Pennsylvania I would not sell a buyer who would not pay within the discount period because I knew if he failed to pay at that time it was self-evident that his affairs were in bad shape. The retailer's margin is so small that the 2% cash discount is very important and if not taken it is obvious he is not a good credit risk.

Whether the refiner absorbed the differential if sugar was shipped by rail and a rail-and-water rate charged, was a matter of negotiations. It would depend on the state of the business and whether the buyer was a large or small one. When acting as principal I generally made the buy- [fol. 484] ers pay the all-rail rate if they wanted all-rail shipment. As a broker I would ask refiners to ship all-rail and charge the lower rate. Sometimes they would and sometimes they would not. After the creation of the Institute it became more difficult for Lowry to bargain with refiners on behalf of the purchaser in respect to the refiner absorbing the differential. I was able to do it before the Institute. When I acted as principal and a buyer asked me to ship all-rail and give him the benefit of the lower

rate, I sometimes did so. It was a common practice of other refiners.

After the War but before the organization of the Institute, purchasers were able to obtain contracts providing for delivery after 30 days. Contracts were not as rigidly enforced before the Institute as they were after it. During the period that I ran the Pennsylvania, other refiners in the eastern part of the country were making contracts with purchasers for longer than 30-day delivery. The overrunning of contracts was quite general.

It was not an uncommon practice at that time to make a contract in the usual form for 10,000 bags, and if the buyer said he could not take delivery of all of it in 30 days, to allow him extra time. That did not appear in the contract but it would be part of the arrangement and was carried out. Overrunning was a matter of individual cases. Some buyers might receive the indulgence while others might not. It could be used as an instrumentality for discrimination and favoritism between purchasers. It was done for small [fol. 485] as well as large buyers. Any buyer could get those terms when he felt his interests so required.

If a buyer told a refiner that another company would make a 30-day contract but would not require him to withdraw his sugar within that time, the refiner would give him an extended time for withdrawals and for payments. The refiner would have no means of knowing whether the story was true except his general familarity with conditions and his judgment that this purchaser was honest. Almost any buyer who wanted a little extra time would not hesitate to ask for it and the chances are he would get it.

Since I became president of National Biscuit, the company has never sought to make a contract on longer than a 30-day delivery basis with any refiner. Before becoming president of National Biscuit and after the organization of the Institute, I made contracts with National Biscuit that extended over 30 days although the contract would not have read more than 30 days.

It was a weakness on the part of the refiner to sell sugar at $4.50 and, after a decline in the market at the end of 30 or 40 days, to make delivery at $4.30, if that was not the understanding at the time the contract was made. From 1925 to 1927 the matter of converting what was not a guar- [fol. 486] anty contract into what amounted to a guaranty

contract with delayed deliveries was not an instrument of discrimination among buyers because the refiners guaranteed it, not with particular buyers, but with the whole trade. In 1925 and 1926 Federal guaranteed their price in all territory in which they sold for a period of 6 months in each year. If a refiner guaranteed contracts at all he would generally do it for everybody. Competition was too keen for him not to do so and it is my opinion that that is what the refiners were doing.

National Biscuit has not wanted a contract for more than 30 days because the markets have been declining. Refined market conditions have always kept pace with the raw sugar market and the general tendency of raw sugar has been downward for the past several years. Since the Institute was organized the 30-day clause has served National Biscuit's purposes for buying sufficiently in advance. In the days before the Institute contracts for more than 30 days with guaranty were more uncommon than those without guaranty. Before the Institute it was common knowledge that Colonial had a long-time contract with a guaranty against price decline with Wrigley but I do not know to what extent it was guaranteed or the length of time. To make such a contract carries with it a risk, but the refiner, [fol. 487] by hedging on the Sugar Exchange, could cover his contract.

Before and since the Institute, beet and cane refiners operating in the 11 far-western states have, because of local canning operations, sold on 60-day deliveries.

Before the Institute, if a regular customer with a 30-day contract felt uncomfortable about taking the sugar at the end of the period, he would ask the refiner not to press deliveries of the balance. The refiner would agree to the extension because the matter usually cleared in 40 to 60 days. At that time the spirit counted for more than the letter of a contract. Since the Institute, contracts for delivery beyond 30 days were not made and it was the general impression that the Institute had made a ruling against them. Unless there had been a ruling of some sort by the Institute there would have been a great deal more of such contracts.

In the 3 years prior to the Institute, National received 60%, or 200,000 bags, of National Biscuit's cane business. National made deliveries in the Chicago territory where we had 20 to 25 plants, some of which were small and some

very large. National Biscuit would always take deliveries in at least carload lots. Any small wholesaler might take as much as a carload lot in the same communities where these small plants were located. The practice of National Biscuit, as well as Coca-Cola and Wrigley in purchasing [fol. 488] carload lots, eliminated warehouse storage, insurance and labor costs, and the risk of the sugar becoming damaged. There is no distinction between purchases and deliveries to our small plants and purchases and deliveries to the wholesaler who buys sugar in carload lots and has it shipped directly from the refinery and stores it in his own premises. The cost to the refiner is the same.

Consignment points in most cities east of the Mississippi were eliminated by the Institute because of the wasteful practices, but in some of the states in the highly competitive territory in the Mississippi Valley they have increased. In areas where the consignment points have been reduced, the great bulk of sugar is bought on direct shipment from the refinery in carload lots just as National Biscuit's is bought and delivered to its various plants. The small plants of National Biscuit occasionally received deliveries from the refiners' consignment warehouses, but such deliveries are small compared with the volume of business we do. Purchases from consignment warehouses by our smaller plants would be small because the cartage expense is ours.

In June, 1928, sugars were moved westward by water from New York by one firm. The refiners were selling f.o.b. to this interest and the firm was reaching various [fol. 489] points on the Great Lakes and selling a little under the refiners' price. The all-water rate was not generally known so this firm was increasing its business.

We adopted a similar practice in 1928 and 1929, making a contract with Hedger Transportation Company for that purpose. The refiners knew what this particular interest was doing but they did not call that method of shipping sugar to the attention of anyone else nor did they do it themselves. I know of no regulation of the Institute nor any agreement among the refiners during the year 1928 that would have prevented any purchaser in the inland points from going to the refiners in New York or Philadelphia, buying sugar f.o.b. refinery, and determining whether the method of transportation should be rail-and-water, all-

rail or all-water. The trade were not generally informed of this method of doing business and so the Institute was not called upon to make any published announcement with regard to it. I think that the published rates of the refiners, during 1928, when I and the other interest carried on this practice, definitely provided any purchaser might buy f.o.b. refinery and ship all-rail, all-water or rail-and-water.

Before and after the Institute there have been 10 or 12 moves a year in sugar and the purchases have always been made at the price existing before the advance was announced. Formerly refiners failed to state how long they would accept business at the old price. Now they name the date on which the increase will become effective.

[fol. 490] Spreckels was a refiner who before and after the Institute operated his plant about 6 months of the year, and frequently declared himself out of the market by declaring an advanced price effective immediately, after placing all his available stock.

When an announcement of a forthcoming higher price was made, a buyer acting under the advice of a broker might refuse to believe there was going to be a higher price and refuse to buy, but the general practice, if the move were a successful one, was for the buyers to place their orders at the old price before the new price became effective. The price of refined roughly follows raw. If after an upward move the advance proves unjustified, there might be several declines before the next advance.

There have been times when the situation in the sugar business was highly speculative but it is not regarded so in the normal course of events. When supply and demand are evenly balanced, sugar fluctuates between ½¢ and 1¢ a pound in the course of a year. During the past 6 or 7 years the price of raw and the price of refined have fluctuated 20¢, 30¢ or 40¢ per 100 pounds in a period of 30 days because the sugar market has been laboring under unusual conditions. [fol. 491] The normal situation was 1914 and 1915, but since the War it has been abnormal. During the period since the termination of Government control of the refining business in 1919 there have been wide fluctuations in the prices of raw and refined and consequently a highly speculative situation in the refined sugar market. Whether these fluctuations wiped out the profits on all the refiners', wholesalers' and retailers' sugar bought on the preceding move depends on how closely to the preceding move the decline comes. If

buyers have sold all their sugar before the new and lower price they lose nothing by the fluctuation. The decline has to be very abrupt if it comes before there is an opportunity to sell the sugar. Whether or not there is a considerable quantity of unwithdrawn sugar at the end of the 30-day period, depends on the demand experienced in the 30 days after purchases have been made. Buyers aided by their brokers are able to take care of themselves. They follow the market conditions carefully, and while it is true they sometimes buy too much sugar, and sometimes find the market decline before they have had a chance to use it, in the main, they do not over-buy. In periods of rising trends they will buy more freely and will profit if their judgment is good.

[fol. 492] National Biscuit never speculates on its sugar purchases. It buys its approximate needs for the period intervening between a given move and the next probable move.

Under Lowry's contract with Hedger there was one shipment of between 60,000 and 100,000 bags by Spreckels to Chicago Powdered Mills in Chicago just before the close of navigation in 1928. At that time Lowry was acting as Spreckels' Chicago broker. Hedger billed Lowry and Lowry billed Spreckels. There was, as far as I know, no violation of the Code of Ethics of the Institute involved, whether Lowry had been purchasing the sugar and was merchandising on his own account or whether it was the sugar of a principal, because he was concerned merely as a broker. The Institute did not issue any regulations with respect to shipments of that sort or make a rule prohibiting sugars being sold f. o. b. It was my understanding the Institute did so later for at a given time all refiners stopped selling f. o. b. in all markets.

American, which owns the only refinery in Baltimore, refused to sell f. o. b. that point because it would disturb the rate from Philadelphia and New York. The Baltimore [fol. 493] rate was lower than that from either of those 2 cities. When American shipped from New York, which had a higher rate than Philadelphia, there would be a certain absorption to meet the Philadelphia rate, but when it shipped from Baltimore, there was a certain gain. This was not a general practice, however.

There is a certain territory in Texas near the refineries where rates to a point might be 10¢ and the New Orleans rate to that same point 18¢. Nevertheless, the Texas refiners charged the New Orleans rate because the buyers would have to buy in New Orleans if they did not buy in Texas.

In 1928 all refiners quoted sugar for delivery from consigned stocks in Chicago at the lake-and-rail rate, which was 43¢ from New York. The barge rate from New York was 32¢. For a great many years it has been the practice of the refiners to sell sugar on the New York basis and to have a freight or arbitrary f.o.b. rate to cover delivery to any interior point. The buyer, to determine the cost of sugar, added the transportation rate established by the refiners to the interior point to the price of sugar. The general practice was to buy sugar from the refiner on the basis of the delivered price which would be named by the refiners and they exercise the right of routing because of the conditions involved in handling at the refinery.

Throughout 1928, those in Chicago and the lake ports were able to profit because the barge rate was lower than [fol. 494] the prepaid basis. I know of no Institute regulation or refiner's announcement that prevented any purchaser doing what we did for Chicago buyers when arranging for space on the Hedger line. It was open to all buyers who had the financial resources to ship sugar, but the ordinary buyer could not do it because he did not handle sufficient quantities. In 1929 we made a new arrangement for Spreckels and C. & H. The trade became conscious that a water movement in 1928 was important and planned to take advantage of it in 1929.

By the Court:

Lowry desired to obtain a transportation company for purchasers, refiners and brokers. We talked the matter over with Spreckles, whom we represented in Chicago and the Middle West, and negotiated with Hedger to move 1,000,000 bags during the 1929 season. Spreckels did not make the contemplated shipments and some of the boats were used by C. & H.

By Mr. Higgins:

The contract provided for the use of all Hedger's space but there was no obligation to provide a minimum amount

of tonnage. The business was new with Hedger and his service was unsatisfactory. The sugar was damaged and controversies arose, over which there is now litigation.

I don't think the unsatisfactory service was the main factor for Spreckles' failure to ship as much sugar as anticipated because they afterwards shipped some sugar by [fol. 495] Hedger. I had no knowledge that Federal's failure to ship as much sugar as anticipated was due to the Institute nor did I mean to imply that it was.

Exhibit 29 was called to my attention at the time it was received. In this particular case, I believe Spreckles understood and knew that Lowry was paying Hedger and that Spreckles was satisfied to pay the higher rate because of Lowry's ingenuity in starting the business.

The National Brokers' Association, of which I was a member, was in existence before the Institute. It was one of the principles of their code that a broker should not split his commissions on the sale of sugar and should not make contracts for his principals ostensibly for the principal's benefit but where the broker himself in any guise gets compensation unknown to his principal. The practice which Lowry always follows was to acquaint principals with exact facts of the case, and to state that Lowry was entitled to a commission in view of the circumstances. A mutually satisfactory arrangement would then be made.

Defendants' Exhibit B was received in evidence.

It is possible that Taylor, vice-secretary of the Institute, [fol. 496] discussed with me the points raised in Exhibit 29. If Lowry shipped sugar for Spreckles as principal and secretly participated in transportation charges, it would be a proper subject of inquiry for Spreckels or their representatives. If we did not tell Speckels we had a contact with Hedger which we sublet to them at a profit, it would be contrary to our customary practice. The matter was not handled by me but by my associates. I did not tell Spreckels and was not present when any of my representatives told them the facts. I do not know whether my associates told them or not or whether Spreckels or any of their representatives knew that Lowry was profiting in this transportation, but I certainly believe that our organization told them. When this complaint came up Taylor asked me the facts and I stated my version of them. I answered freely and did not demand a written authority from Spreckels.

Redirect Examination.

By Mr. Fly:

One way that Texas refiners could keep their business, even though charging the full New Orleans rate, was to cut the price of sugar rather than the freight, but I do not know that they did this.

In arranging for transportation with Hedger, we acted only for Spreckels.

In Chicago we were brokers only for Spreckels.

[fol. 497] Petitioner's Exhibits 32 to 34, inclusive, were received in evidence.

Recross-examination.

By Mr. Higgins:

When Spreckels bought transportation, whether from Hedger or from Lowry, he did it for his own account, placed his own sugar on the boats and shipped to Chicago or any point. The property was his, went out on consignment and was put in storage for his account to be sold at prices named by him, irrespective of what he paid for freight.

Defendants' Exhibit C was recived in evidence.

The statements contained in Exhibit C were proper statements of ethical business practice covering the relationship between a broker and his principal.

Defendants' Exhibit D was received in evidence.

We executed for each refiner with whom we did business a pledge similar to the one executed for Spreckels. I was [fol. 498] very glad to sign it because I regarded it as a correct statement of the ethical obligations of a sugar broker.

[fol. 499] Henry King was called as a witness on behalf of the Petitioner.

Direct examination.

By Mr. Fly:

I am president of King, Dobbs & Company, a wholesale grocery concern located at Chattanooga, Tennessee. In

the early part of 1930 refiners were charging customers in this territory the all-rail rate despite the fact that sugar could be moved by barge-and-rail at a lower rate.

I called on Wogan, general manager of the Colonial sugar plant at New Orleans and asked for the privilege of buying and shipping sugar from New Orleans to Chattanooga by barge-and-rail. I wanted to take delivery f. o. b. the refinery. He replied that it was against the rules of the Institute and refused to give the permission. I did not succeed in my purpose.

Cross-examination.

By Mr. Higgins:

Prior to December, 1929, we had the privilege of buying sugar from Colonial f. o. b. the refinery. By having it shipped by barge and paying the barge rate, we could compete with the New Orleans refiners. The refusal to ship f. o. b. refinery lasted 5 months. Since June, 1930, the right to buy f. o. b. refinery has been available at all times. The only time that I sought the privilege was during the few [fol. 500] months before mentioned.

The privilege was sought because the privilege we formerly enjoyed had been withdrawn by an announcement in December 1929 and I wanted to save the difference in freight which was 7½¢ per 100 pounds. The freight rate, which was part of the announced price during this 5-month period, was the lowest all-rail freight rate from any refinery to our place of business. In our case it was based on the Savannah rate which was slightly lower than Colonial's but higher than the barge rate. The practice was to ship sugar up the Warrior River by barge and then trans-ship it from Birmingport to Chattanooga. The actual cost by all-rail from New Orleans to our place of business was higher than the freight application that Colonial was using because Colonial used the Savannah rate.

Wogan, of Colonial, said he could not give me the privilege of buying sugar f. o. b. New Orleans because it was contrary to the rules of the Institute. I understood the announced policy was to give the same price and terms to all brokers. I understood that if Colonial gave this privilege to me alone it would be contrary to their policy of publicly announced prices in that territitory and would be considered a violation of the Institute rules.

[fol. 501] I did not know the Institute was responsible for putting into effect the delivered prices which forbade selling f. o. b. refinery. The announcement came from each refiner. We never had one from the Institute. I had no information from any other authoritative source of any connection between the Institute and the rule of delivered prices that was in effect.

In May, 1930, the rates and terms in our territory went back to the customary basis and have remained there ever since.

We have received the benefit of the barge rate on sugars shipped by rail with a result that New Orleans refiners absorb freight charges of 3¢ to 7½¢ per 100 pounds.

Redirect examination.

By Mr. Fly:

During the periods when rates were equalized we shipped by rail because there was no saving on barge shipments. The rail service was quicker and the rate just the same.

Wogan did not state that Colonial could not give us the barge-rail rate because to do so would be unfair to other customers. He simply stated that it would be a violation of the Institute ruling.

[fol. 502] Frank D. Eaman was called as a witness on behalf of the Petitioner.

Direct examination.

By Mr. Rice:

I am a member of the law firm of Stevenson, Butzel, Eaman & Long, Detroit, Michigan. In the past 3 years we have represented W. H. Edgar & Son and Edgar Sugar House of Detroit.

I met Judge Ballou, executive secretary of the Institute, at the office of Cummings of Sullivan & Cromwell in June, 1929. My clients were interested in obtaining sugar and had been notified by telegram that until they elected to become either brokers, warehousemen or wholesalers they could not buy sugar. My client received bulletins stating that he could not buy sugar f. o. b. the refinery. Edgar had arranged shipments by water to Great Lake ports and the

question of his being able to obtain any more sugar on that basis arose.

Cummings, in explaining the purposes of the Institute, said there were a great many evils and abuses in the sugar business and the matter of eliminating these had been taken up and approved in Washington. I stated to the Judge and Cummings that I couldn't understand how a code of ethics could be imposed on merchants and brokers without giving them a chance to be heard on the subject and that [fol. 503] the Edgar people had been in Detroit a great length of time and we did not think it was fair to close up any one of those businesses that had been going a great many years, particularly in view of the volume of business we were doing.

Petitioner's Exhibits 35 to 56, inclusive, were received in evidence.

In the conversation with Judge Ballou we took up the telegram requiring us to elect the form of business in which we were to engage. The Judge said that it had been determined that it was the only way business could be done because the other methods led to discriminations and abuses which had to be changed. Edgar felt that in view of his large business in that territory he should have some right to be heard and consulted before being arbitrarily told he had to give up two-thirds of his business. He was a merchant, had acquired a chain of stores and was a warehouseman, not only in Detroit but in other cities. He was also a broker. The Judge stated that there were unfair practices in that form of business and it had been agreed that they must stop. He complained of the unfair practices by Edgar.

[fol. 504] I took the position that if my client had warehouses authorized to issue warehouse receipts he was a public institution and could perform that service if allowed to do so. Judge Ballou said there was a possibility of part of these service charges being passed on so that the trade was not treated alike.

The Judge said that the first paragraph of the Code of Ethics stated that business was to be done on open prices and that one important step in bringing this about was to prevent abuses in the merchandising and brokerage of sugar, and that in allowing the broker to combine in any way with other branches of the business would tend to lead

to discrimination and abuses in prices. Concerning delivered prices I told him that Edgar had arranged for water transportation to the lake ports and that the rate was approximately half of the delivered price rate. Judge Ballou contended that unless deliveries could be made by carriers amenable to the Interstate Commerce Commission, where there were published tariffs, the same abuses would creep in by combining warehousemen, merchants and brokers.

I contended that if water shipments were a cheaper and logical way of shipping heavy merchandise into the Great Lakes area, they would be made and we wanted them continued in our business.

[fol. 505] I asked if there was not any way of yielding on the agreement to adopt delivered prices as we could not get sugar. They told me that unless Edgar would elect the form of business he was going to take he could not get any sugar and certainly only on delivered prices. Judge Ballou told me that the adoption of delivered prices could not be changed at that time. Then he told us that they must persist in maintaining the position they had announced to us. He was speaking for himself. He said he would not recommend a change and that it could not be changed, that Edgar could not buy f. o. b. refinery any more. He said the privilege of buying sugar f. o. b. the refinery would no longer be permitted.

We have received telegrams from the refiners stating that unless we replied to their former wires demanding an election of activities by us they would refuse to sell us sugar.

Judge Ballou and Cummings said that the concept of the Institute grew out of the unfair practices among refiners themselves as well as throughout the country, *try*, that the sugar industry was getting into disrepute and the refiners were partly to blame. The Judge said that the only way to conduct the sugar business was to have a standard open price, which necessarily meant a base price at the refineries, and if that method be adopted properly, abuses would be prevented.

Cross-examination.

By Mr. Higgins:

At the time of this conversation I understood that the refiners as well as the Institute sent out announcements con-

cerning prices. I thought it was necessary to take up with the Institute the matter of delivered prices because it had made these announcements for the various refiners.
[fol. 506] When I saw the telegrams from the refiners to Edgar announcing the same changes in price which were covered also by the telegrams from the Institute, it plainly indicated to me that there was a concert of action as far as refusal to sell f. o. b. refiner was concerned.

Judge Ballou and Cummings said that they could not deal with Edgar on any different basis than they did with other people because it would be in violation of the principles of the Institute.

I requested that the refiners, instead of enforcing their delivered prices, sell Edgar f. o. b. refinery and allow him to transport the sugar to Detroit, but they explained that they could not deal with Edgar except on the basis of their publicly announced prices without discriminating against their other customers and violating the principles of the Institute.

We had handled 5,000,000 bags of sugar the year before and felt we should be dealt with on a different basis than a man who had handled 5,000 bags.

I conceded there might be more of a conflict in acting as broker and merchant than in acting as broker and warehouseman but stated that this method of doing business had long been followed by Edgar without complaint. Judge Ballou told me of charges of abuses by the Edgar concern which I had not heard theretofore.

The Institute did not ask Edgar to give up the practice of storing sugar for other brokers but stated he could not store sugars for which he himself acted as broker in any way. It was Judge Ballou's and Cummings' position that [fol. 507] in acting as a broker representing refiners Edgar might pass on some of his warehouse charges to the trade which would result in one customer in a locality having a benefit that other customers would not have. I maintained that if Edgar had warehouses well located and could do the service cheaper he should not be forced to put that business in some of the new warehouses that had insufficient financial backing.

Petitioner's Exhibits 57 to 59, inclusive, were received in evidence.

[fol. 508] HERBERT I. SMITH was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am a sugar buyer for Joannes Brothers Company, Green Bay, Wisconsin. This company is capitalized at $1,000,000 and does a general wholesale grocery business in Wisconsin and Michigan. In the past 10 years it has bought cane sugar from nearly all of the leading refiners of the country and has handled about 175,000 bags per year.

The price a wholesaler maintains on sugar has a very large bearing on the other business he can command. If he has an attractive price he stands a better chance of getting a large share of the grocery business because sugar is used as a football in price. Retailers sell it at or below cost and it is one article in the grocery line they watch a little closer than anything else. A difference of 5¢ to 10¢ per hundred is very important in the trade and would be the means of getting additional business.

Prior to the formation of the Institute we obtained concessions from the defendant refiners, of 5¢ to 8¢ a bag. We asked for this concession because of the volume of business we did compared to others in our locality.

[fol. 509] In 1928 National was selling sugar to us at the Milwaukee price which was 5¢ to 8¢ a bag less than the Green Bay Price. This represented a difference between rail freight rates to Green Bay and to Milwaukee.

In 1929 my company built on the Fox River a warehouse and docks suitable for unloading directly into the warehouse. This enabled us to handle quantities sufficient to get shipment by barge by the Great Lakes. Our purchases of cane sugar and the amount shipped by water are as follows:

Year	Number of bags handled	Number of bags shipped by water
1925	105,000	24,000
1926	111,000	47,000
1927	146,000	92,500
1928	182,000	80,000
1929	133,000	28,000
1930	175,000	43,800
1931	129,000	38,000

The increase in volume of business was almost wholly due to the lower price obtained in shipping by barge. It gave us a competitive advantage of practically 20¢ per bag.

We did not ship exclusively by barge because at times sugar was needed quickly and there were special grades that the refiners were not in a position to ship by barge.

[fol. 510] In April 1929 the refiners announced that they would only sell sugar to Green Bay on a delivered price basis at an all-rail rate so there was no advantage in shipping by barge any longer as the price was the same.

Petitioner's Exhibits 60 and 61 were received in evidence.

During the balance of 1929 efforts to obtain shipments f. o. b. were unavailable though I tried all the brokers with whom I had any dealings. I talked to brokers representing National, Revere, McCahan, Colonial, Arbuckle, Spreckles and Pennsylvania and they said it was impossible to get barge shipments because of Institute rules that no refiner should accept business except on a delivered price basis with the rail rate added.

In 1930 I was able to buy 2 lots of sugar from Spreckels by barge but later they declined to accept any more business of that kind though no reason was given for their refusal except that they could not accept any more. We also managed to buy sugar refined by Cuban American Sugar Company at 10¢ per hundred below American refined. Their price is cheaper because foreign white sugar is inferior to American.

In 1929 our sugar sales dropped almost 50,000 bags and there was a further adverse effect on the sales of other merchandise.

[fol. 511] After the refiners stopped selling by barge we had to pay the actual freight rate to Green Bay so that we were paying 5¢ and a fraction higher than Milwaukee wholesalers.

After April, 1929, our shipments of sugar came from consignment points at Milwaukee and Green Bay and although some of this came by water nevertheless we paid the all-rail rate of 56.2¢.

In 1928 National and 2 other refiners notified us through their brokers that the concession of 5¢ to 8¢ we had been obtaining was withdrawn. We have obtained no concessions from them since.

I have made it a practice to study the refiners' margin to determine whether there was a likelihood of an advance

or decline in the sugar market. If there was a large differential between raws and refined it would indicate a decline impending. If the margin was small it would indicate an advance. This could be depended on pretty well but since 1928 it has been hard to determine what the market was going to do by the action of the raw sugar market and the price of refined advances or declines when least expected. Sometimes after an advance was announced the refiners changed their minds and decreased the price. We subscribe to Willett & Gray and find it reliable and dependable.

From 1925 to April, 1929, in making purchases of sugar [fol. 512] by barge we passed the saving of 20¢ to our customers and believe they in turn passed it on to the consuming public. In 1929 there was a substantial decrease in shipments in sugar and other commodities from Green Bay to Michigan as the result of the refiners' announcements.

Cross-examination.

By Mr. Higgins:

For the past 25 years 75% of our sugar was purchased from National although we bought from different concerns especially from 1925 to 1930. There was a special demand for National brand as a result of advertisements but we had to carry a full line as other companies were building up good will by advertising. From 1920 to 1930 our company was successful in gradually increasing its business. I do not believe that our business had dropped more in proportion than that of others in 1930.

An arangement with Harper of Spreckels to sell sugar at a concession of 5¢ per bag was made in January or February, 1930, at the Chicago convention of the National Wholesale Grocers Association. The arrangement went into effect immediately and contained no other provisions. Thereafter for a period of 3 months we gave our business to Spreckels until an announcement came over the telephone [fol. 513] that the offer was withdrawn.

The sugars produced by American, National, Spreckels, Arbuckle, McCahan and other leading refiners are regarded as practically the same quality and a better price could not be obtained for one brand than for another. They are uni-

form in quality and the sole determining factor is price. A difference of 5¢ a bag would be sufficient to induce us to stop handling National's sugar with its brand name and good will that had been built up in our territory for a period of 20 years because the trade is not particular about brands of sugar as long as it has good sugar.

A gross profit of 10¢ a bag in handling is considered satisfactory. The cost of the administration and selling expense of our business is about 8%, so, assuming the price of sugar at $5 a bag, a sale at a 10¢ profit means receiving 30¢ less than the general average cost of doing business.

The only advantage in handling sugar is for the purpose of boosting the rest of the business. It is a consistent practice to offer an inside price on sugar for the purpose of getting the grocer to buy other lines. We would not refuse to sell a good customer sugar alone as long as we expected to get additional business from him. We would not sell to [fol. 514] a retail dealer who is not a regular customer. Sugar is an outstanding loss leader among wholesalers.

The retailers themselves lose on the sale of sugar and a concession of even 2¢ or 3¢ a bag would be accepted favorably because it would mean just that much reduction of the loss. When sugar was received at the water rate we were able to sell to northern Wisconsin and the upper peninsula of Michigan. The area was much wider before we lost the water rate and the advantage of the water rate was used to extend our territory and increase business in other lines.

In 1930 we brought in Cuban refined and were able to get along fairly well and in 1930 and 1931 felt we had regained some of the business lost in 1929.

Through our territory, particularly in the larger towns, there are wholesale grocery houses in addition to those in Chicago and Milwaukee. Those inland do not have the water rate advantage but must get their sugar by rail from the nearest refinery center.

From the formation of the Institute until April 1929 we felt it more advantageous to buy sugar f. o. b. the refinery and take the market risk while it was coming by barge-and-lake even though it took 18 to 21 days when shipped in that [fol. 515] manner.

By the Court:

When sugar is purchased 2% 7 days, net 30, it does not matter at what time during the 30 days instructions are given to ship the sugar. The question of length of time it took to transport, whether by rail or water, did not enter into the situation. In regard to the credit situation, if the shipment was f. o. b. delivery to the purchaser, the 7-day discount applied from the time of the arrival of the cargo and terms were the same after as before the Institute.

Mr. Higgins resumes:

During the 18 to 21 days it took to transport the sugar a decline in price would be borne by the purchaser. If purchases were made from the refiners' consignment warehouses in our territory shipments would be received overnight and there would be no market risk but there would be a sacrifice of 20¢ a hundred because of the difference in freight rate. During 1928 there were times that the sacrifice of 20¢ was less than the loss taken by a decline in the market.

During the 1928 shipping season there were declines in [fol. 516] sugar which resulted in losses to my company. No records were kept of the losses taken by the decline in price while the sugar was in transit so as to compare them with the 20¢ saving on the cheaper rate. I thought it unreasonable for the refiners not to guarantee against a decline while the shipments were still on the water. We wanted protection against decline for as long a period as they would have given if the shipment had gone by rail, but we did not get it.

In the conversation with various brokers about the withdrawal of the water rates, none of them mentioned any specific regulation of the Institute which would have prevented our getting what we wanted. At that time I did not know of the Institute regulation that provided:

"The customer has the right to ship over differential routes from refinery points, taking the slower service at his own cost and risk of the market, during the transit period."

I do not believe this regulation was in the minds of the brokers.

During the period that sugar was moved into our area by water we were able to sell sugar in points close to Green Bay in competition with the refiners' other customers who did not have water routes at a less price than these customers were able to buy from the refiners, but as we went [fol. 517] further into the interior the 20¢ advantage was lost. Brokers told me of complaints received from our competitors to the refiners but I did not see how we were responsible. I did not know there were complaints of discrimination but there were complaints because we were able to buy our sugar lower than our competitors.

Beet sugar has constituted about 25% of our business in the past few years. During that time the differential between beet and cane has been 20¢. The price of beet like that of cane is based on the seaboard basis, that is, the cost of freight is added to the basis price of each. Beet companies meet the cane refiners' delivered price in addition to giving their own differential.

At the present time there is a beet factory in Green Bay from whom we buy sugar. It charges, in addition to the cane refiners' base price at the seaboard, the cane refiners' ruling freight application from the seaboard to our town less 20¢ so that during the time we saved 20¢ by reason of water transportation, cane sugar could be purchased as cheaply as beet.

The only concession which we received from National was that of 8¢, which was the difference between the refiners' regular delivered price to Milwaukee and their regular delivered price to Green Bay. In the refiners' published ap- [fol. 518] plications the base price at Milwaukee appeared. We assured ourselves of the concession by reading published market reports every day. I heard rumors, but had no proof, that National and other refiners were selling sugar to various customers at a base price less than the published and announced price. If our competitors were getting a concession we knew nothing of it. We thought we were getting as good a deal as any of our nearby competitors. In fact we thought we were doing better because we were able to sell National's sugar at a little less than they were.

Before the Institute, price declines were guaranteed up to the date of arrival if shipment was by rail. From 1925 up to 1927, during which time we purchased large quantities

from National by water, we obtained a guaranty of price up to the date of delivery.

Purchasers from National in our competitive territory were buying sugar out of consignment where they could get deliveries within a short time and as to those customers we had not only a 20¢ differential by reason of water rate but a guaranty of about 20 days longer from time of purchase.

In one of the years before the Institute was formed we had an arrangement with National whereby they shipped sugar to our warehouse consigned to themselves and we [fol. 519] were allowed to use it at our convenience. The principal advantage of this concession was the freedom from loss on price declines. The sugars did not have to be paid for as promptly as they would have otherwise.

We did not report every time we took a few bags of sugar. There was no special time for making the report. Once a week was sufficient. If there had been a price decline during the week and some of the sugar reported on Saturday had been withdrawn before the price decline, we reported the withdrawals as of Saturday and at the lower price.

National had no broker or representative to check our withdrawals and never made a check. The value of the privilege cannot be estimated but it was worth more than the 8¢ which I have described. Upon becoming a consignment point we paid the refinery base rate plus the water rate even though shipments were all-rail or rail-and-water.

We had the opportunity to report as much stock on hand as we wanted. If the price advanced during the time the sugar was on consignment in our warehouse we had the privilege of having any portion of it billed to us at the lower price. Our warehouse was not used by National as a general consignment warehouse out of which our com- [fol. 520] petitors could take sugars ex-consignment.

The period during which we did not have the privilege of buying sugar f. o. b. the refineries lasted from April 29, 1929, to May, 1931. From that time we have had the privilege of buying sugar f. o. b. refinery in New York and shipping it all-water but the only sugar shipped on water was Cuban refined. We did not buy sugar from the defendant refiners for all-water shipment during the period. In the calendar year 1931 38,000 bags, all of which was Cuban refined, came by water. All other sugar used amounted to 90,000 bags, of which 60,000 were domestic cane. During

the navigation season our purchases from domestic refiners were by rail because we did not care to buy as much as 10,000 bags of any particular refiner's brand in that year. We did not ship domestic refined cane during the navigation season of 1931 because domestic refiners were charging the all-water rate to Green Bay on all-rail shipments and there was no advantage in shipping by water unless a still lower rate could be obtained. I do not know whether the off-shore sellers would ship their sugar by rail and give the same cheap rate. We did not try because we had the opportunity of securing a still lower rate by water. The 38,000 bags which we purchased from Cuban American were shipped at an actual rate of 25¢.

[fol. 521] The arrangements for the shipments were made by the sellers. We knew nothing of the actual rate except they agreed to give us the lowest rate they were able to obtain and then sent their invoices to us.

During 1931 30,000 bags of domestic refined were bought from the different refiners in carload lots during the shipping season. Our largest purchases did not exceed 3,000 bags. In order to take advantage of the barge rate it was necessary to buy 10,000 bags and that has been true from 1925 until the present. Because there was an insufficient saving in price and it was necessary to buy in such large quantities, we did not have large shipments made by barge in 1931.

The lowest rate which the defendant refiners published and applied on all shipments after May 5, 1931, was the lowest water rate ever paid on any shipments except those obtained from Cuban American and for this low rate we had only a risk of price decline for 10 days while the shipment was coming by rail instead of 21 days when it came by barge.

Stock was usually ordered from refineries or from consignment at Milwaukee. We did not draw from the Green Bay consignment because we would have had to pay for the trucking. During the winter of 1931 when there was no navigation we could still obtain sugar from New York at the barge rate. While the arrangement since that date has [fol. 522] been very satisfactory because of the low price and quick service, it has put our competitors on the same basis,—even those who buy 10 bags at a time,—and that is where the shoe pinches.

I have no other complaints against the various new conditions that have existed since the Institute was created except those voiced on the witness stand. I have no way of telling whether the Institute was responsible for the delivered price system that existed from April, 1929, to May, 1931 except statements by brokers and they did not indicate that the Institute was responsible for delivered prices. The brokers only indicated that the Institute was responsible for their inability to make an arrangement for selling sugar to us on some basis other than the announced public price and Institute prices.

The violent fluctuations in the price of sugar have been more frequent in the past 4 years but I do not know whether the Institute was responsible. I have no specific occasion in mind since the organization of the Institute when the spread became wider and the fluctuations more violent than on similar occasions before the Institute. I have not had occasion to compare similar seasonal variations of prices before the Institute with those after.

[fol. 523] We collected for the special concession, obtained from National on the 5¢ to 8¢ differential in the Milwaukee and Green Bay rate, by billing them for the difference. They billed us for the regular published rate, both price basis and freight application, and we billed them back in a separate bill for the excess they had charged. If one of their bills had fallen into the hands of a competitor he would not have been able to tell that we had an inside cut.

Redirect examination

By Mr. Rice:

The barge arrangements were profitable in spite of price declines and had they not been so we would not have continued them for several years.

The special rebate obtained from Spreckels by the secret arrangement made in Chicago in February 1930 came as a personal check to me. The arrangements we had with Spreckels were very unusual and had never been made by any sugar company.

There was nothing secret about the concession of National before the Institute. Their check for the rebate was made to Joannes Brothers, not to me personally. After

the secret arrangement with Spreckels, Joannes billed Spreckels for the 5¢ rebate on their regular stationery but the check was made to me personally.

[fol. 524] When we purchased sugar from National prior to the Institute and it was consigned in our warehouse we had a clearly definite understanding with National as to how it should be withdrawn and reported. We were never charged with deceiving nor did we deceive them in the withdrawal of sugar.

Since the formation of the Institute we have not been able to make money on sugar and probably have sustained losses. The announcement of the refiners of May 5 of meeting the all-rail rates did not do the business any good that I know of. It caused us to continue handling foreign sugar and to get a still lower freight rate.

I am quite sure we averaged a small profit on sugar between 1925 and April 30, 1929 when shipping by barge, though I have no figures to use in answering the question.

Recross-examination.

By Mr. Higgins:

I have no exact figures which show whether we made a profit on sugar from 1925 until April 1929. We never kept separate accounts. The sales were all entered up with other merchandise and there is no way of separating them in our present bookkeeping system. I made a general statement according to my remembrance of deliveries and conditions during the time.

[fol. 525] Harold L. Brown was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

In 1928 I was co-receiver of Detroit Railway and Harbor Terminal located in Detroit, Michigan. In 1929, after its reorganization, I became president of Detroit Harbor Terminals, Inc. The latter company operated a general warehouse business, dock and stevedoring operations on the De-

troit River and did a cold storage warehouse business. It occupied one main warehouse and operated 3 others under lease from W. H. Edgar & Son.

The space was leased from Edgar because of the Institute ruling that Edgar could not be in the warehouse business. I negotiated with Edgar and his manager, Beebe, and the lease on the plants was made subject to the approval of a committee of the Institute which came to Detroit and inspected the space and the main warehouse.

I first met Louis Chinal in the office of the Detroit Harbor Terminals in the late fall of 1930. He had credentials from the different refiners and the Institute. He said he was their special investigator and was entitled to inspect any records of the different refiners. He continued his investigation at our warehouse 4 or 5 months at different times. He investigated all the records we had. He said [fol. 526] he was investigating different brokers to see that they lived up to the Code of Ethics of the Institute. He told me he was investigating Edgar, which I knew because he was the only broker handling sugar who stored in our warehouse. During the investigation I talked with Chinal practically every day. He said he had been to Indianapolis investigating Edgar and found irregularities there with respect to the Code of Ethics and due to this investigation Edgar lost some business because of the irregularities which Chinal had discovered in connection with cartage. He expected to find the same thing in Detroit.

He asked for records of sugar belonging to the refiners. He wanted to know about the sugars belonging to Edgar but not held by him as broker. He asked for transit billings, shipping orders and bills of lading. I declined to give them to him because they were Edgar's papers and I told him we would have to receive permission from Edgar and that if it was granted, we should be glad to furnish them. I did not show him any of Edgar's files or re ords.

Cross-examination.

By Mr. Higgins:

I met Edgar in Detroit in 1928 when we leased the space in the 3 warehouses at the time the Institute made the [fol. 527] ruling. I met Beebe, Edgar's manager, shortly after going to Detroit. My contacts with him were very

frequent from the time I started with Detroit Harbor Terminals because the Edgar companies were among our most important customers.

In 1929 we leased the space in the Edgar warehouse according to our needs. The lease was on a flexible basis of 5¢ per square foot. Our sections were not partitioned off and except for chalk marks on the floor and strings above the goods there was no way of telling which was Detroit Harbor Terminals' and which was Edgar's space.

We had a man in charge of the stocks in each one of the warehouses and Edgar had a manager at each warehouse. The Edgar warehouse handled the sugar in and out but had nothing to do with the accounting, which was handled by the main warehouse of Detroit Harbor Terminals. In these spaces which we leased sugar was stored exclusively. Edgar had the remainder of the space and in it stored beet sugar.

Our clerks made up all delivery orders, deliveries from consignment and bills of lading relating to the sugar for Detroit Harbor Terminals stored in the 3 Edgar warehouses and the papers were kept in our vaults. All docu- [fol. 528] ments relative to the sugars we were storing for the refiners, whether in the Edgar or our own warehouse, were kept in our files. There was a copy kept in the office of our employee in the Edgar warehouse. He had copies of practically all of the papers. We had copies of the original papers and the bills of lading. Prior to May, 1930, Edgar always made out the bills of lading covering shipments of sugar that they had in their own warehouses, but the Institute and the refiners decided they wanted us to make them out and from that time on we had the original papers.

In transiting sugar the refiner ships it to a central point, such as Detroit, and stores it before forwarding it to local points. The incoming bills of lading would be used in forwarding from the central to local points. The refiner, however, would only pay the through rate from New York to the local point (plus a $2.00 per car transit charge) instead of the rate from New York to Detroit plus the local rate from Detroit to the local point. As the former rate was less than the latter, the transit privilege was valuable to refiners.

When the sugar came to the warehouse it was first registered for transit. We would then issue a warehouse re- [fol. 529] ceipt to the different refiners, take any orders that came through brokers and make a copy of the documents and see that they matched. We would then bill the refiners for storage and the handling of the sugar. Up to a certain time all documents which we signed in connection with these sugars for the purpose of receiving, tracing and determining whether or not transiting was being done legally or illegally were signed on behalf of the refiners by Edgar acting as their agent. Later this function was performed by Detroit Harbor Terminals.

All documents relating to possible transiting abuses in our warehouse and in the Edgar space, were handled by Edgar as broker for the refiners or by our company as warehousemen for the refiners. When the sugars moved out of our warehouse under the transit privilege we had to register transit bills with the carriers' Transit Bureau.

In the spring of 1930, due to the instructions of the different refiners and of the Institute, we prepared all bills of lading in our office. Not all the supporting documents, indicating whether sugar had been properly or improperly transited, were in our possession. Some of these billings which Edgar had shipped and which he had handled were in his possession. We had copies of them but those that [fol. 530] he had shipped and handled were his records, not ours. We had the copies because we signed the transit privilege as the warehouse. The records in our possession showed all sugars belonging to the refiners except those that Edgar purchased f. o. b. refinery.

Chinal was tracing sugars taken over by Edgar after arrival in Detroit. I heard from no one, except Chinal, complaints of the switching of water-borne sugars that had no transit privilege for rail shipments of sugar that had the transit privilege. I believe this type of switching is a criminal offense.

Chinal asked me in writing for all the records which he wanted during his investigations. If I felt he was entitled to them under his authority from the refiner I gave them to him. If I did not, I told him I could not and gave him the reasons. In instances where Edgar acted merely as broker I gave all the records, but in some instances where Edgar had at some time or other during the transaction

owned the sugar I gave him no documents. In no case did I give Chinal records which related to sugar which moved into our warehouse as property of the refiners and moved out again as property of Edgar's, because the sugar ultimately became Edgar's. It was my position in the mat-
[fol. 531] ter that Chinal should get the information from Edgar.

There was no question about illegality of these various shipments. They were records of sugar belonging to Edgar and I could not give them to Chinal without Edgar's permission. Chinal said, that according to information of the refiners, Edgar had substituted water-borne sugars which were not entitled to move out under transit billing for their rail-borne sugars which had moved into Detroit Harbor Terminals Warehouse. I have never seen any document indicating such a transaction.

Beebe, Edgar's manager, directed me to refuse to exhibit to Chinal the documents which would show whether illegal transiting had taken place; that if sugar had become Edgar's at any time after it was stored in our warehouse we could not without Edgar's consent exhibit to Chinal the supporting documents which would show whether or not the transit billings had been improperly used by Edgar for shipping out this sugar.

From December 1930 to March 1931 I saw Chinal practically every day when he was requesting documents. If I felt there was something he was entitled to under his authority from the refiners I gave it to him.

Every day while Chinal was investigating we had arguments with him over transit holdings and other records that he wanted that belonged to the Edgar people and which we, in our opinion, could not give him. There were some records which he received and some which we refused to give him.

I had a conversation with Chinal and Patterson of the Institute in New York about Chinal's investigation of
[fol. 532] Edgar and Detroit Harbor Terminals. They had a list of cars concerning which they wanted information. I called Detroit and asked for the facts with reference to those particular cars, as to what the shipment was and whose sugar it was and thought they were entitled to the information. They wanted to see the shipping records, transit billing and the D from Cs. We discussed all the

documents relating to those 5 cars and the sugars in them. On the information I received over the telephone I told them that if Chinal would come to Detroit I would show him all the documents concerning the shipments in and out of that sugar. I do not recall if I changed my mind and refused to show the records of those particular cars but if I did so it may have been because the information over the telephone was incorrect.

Defendants' Exhibits E and F were received in evidence.

I cannot say positively that the 5 cars discussed in the New York office were those mentioned at the end of Chinal's letter. I cannot connect the 5 cars with any one conversation. I do not remember if they were the same cars about which I changed my position on returning to Detroit.
[fol. 533] I do not remember how quickly Chinal came to Detroit after the New York conversation. I do not recall talking to Beebe about these particular cars but I did discuss, during the investigation, practically everything Chinal asked for so probably those particular cars were mentioned. During the conversation in New York there were some cars referred to me and I talked to my office long distance and asked for the records of those particular cars. I don't know whether I agreed they were entitled to the records or not but I did tell Chinal and Patterson that they were entitled to records on certain cars. Whether those were the 5 or not I cannot say but after I returned I found they were not entitled to them and that is why the letter was written. I do not know that it was on my assurance to Chinal that he came to Detroit in May 1931 to renew the investigation.

Defendants' Exhibits G and H were received in evidence.

Redirect examination.

By Mr. Rice:

I showed Chinal records relating to sugars owned by refiners when he requested them. I never refused to show him documents relating to their sugars.

[fol. 534] EUGENE JOSEPH O'RILEY was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am vice-president of Chicago Sugar Company which merchandises sugar in Chicago. Before the Institute was formed it operated in Indiana, Illinois, Wisconsin, parts of Michigan and Minnesota. Today it operates in Chicago and the Chicago switching district, which includes Hammond, Gary and Joliet.

Prior to the Institute we sold 1,000,000 to 1,500,000 bags of cane sugar which was a little less than 1% of the total business of the country. Before the formation of the Institute we obtained from the refiners a concession of 10¢ to 20¢ per 100 pounds.

We also operated a warehouse bonded under the laws of Illinois and did a general merchandising business which netted us between $75,000 and $100,000 a year. We stored sugar for refiners, jobbers and manufacturers. We did not operate as brokers. Since the formation of the Institute we have been unable to obtain concessions except in a few instances.

In May, 1930, I had a conversation with the office manager of George E. Keiser, brokers for National and Colonial in Chicago. He said it was impossible to obtain any con-[fol. 535] cession as the Institute would not let him. I offered to buy 50,000 bags of sugar from National if I could buy f. o. b. New York and gave him until 3:00 o'clock to fill the order. Five minutes before 3:00 o'clock he told me he was sorry he could not take my order because National told him that it was not permitted by the Institute to ship f. o. b. New York.

In December, 1927, Stubbs, vice-president of American, and Murphy, sales manager of their western division, came to see my brother and me. They told us American was joining the Institute and all of the concessions which we had been obtaining would have to stop and that they would not store in our warehouse any longer. They asked us to go along with them and said that within 3 or 4 months they would take care of large buyers like ourselves in the matter of giving concessions.

After the formation of the Institute we received no telegrams from its members because the refiners never wired us. These telegrams came to the brokers, the refiners' agents, and we received a copy of those reports. The refiners very seldom wire us direct. It was through conversations with the brokers that we received notice sugar would not be stored in our warehouse.

[fol. 536] In 1926 we received a concession of 20¢ a hundred pounds from Godchaux.

Before the formation of the Institute we transited sugars from Chicago to other cities. Under the retransiting privilege sugar could be stored in Chicago for 40 or 50 days and then shipped to other points by rail. The prepaid rate from New Orleans to Green Bay, Wisconsin, would be less than the rate from New Orleans to Chicago plus the local rate from Chicago to Green Bay. On retransiting we would get the benefit of the through rate to the point of destination. The prepaid rates which the refiners were charging were not the through rate. Thus, if the prepaid rate were 58.3¢ and the through rate 45.3¢ we could pay an additional 3¢ and get the sugar into Green Bay at a price cheaper than the customer could buy from the refiner. As a result of this transit privilege our business was not localized and we were able to do an inter- and intra-state business.

Since the formation of the Institute, we have been asked by the refiners for the customers' names, even in reconsigning in the Chicago switching district. Since the time of the Institute, we have transited sugars in the Chicago switching district but are unable to ship them out of it. Since 1929 we had transited beet but not cane sugar to points 150 miles from Chicago.

Petitioner's Exhibit 61-A was received in evidence.

[fol. 537] Prior to the time Exhibit 61-A was written we had a gentlemen's agreement with the refiners that we would not ship outside of the Chicago switching district and we had to keep our word because there were only certain sources from which sugar could be obtained.

Prior to the formation of the Institute we studied the raw sugar market by watching the reports in Willett & Gray's Trade Journal. At that time the refiners' margin was between 90¢ and 1.10 per 100 pounds. If the raw sugar market went up and we figured there was some reason for it,

we purchased sugar. We relied on this study to determine our purchases of refined sugar. Between April 1928 and the filing of Government's suit the refiners' margin was as high as 1.67. That was June 7, 1928. For a period of 6 months the raw market would go up and the refined go down.

From studying Willett & Gray's I found that in 1929 the average spread was 1.097. After the formation of the Institute the average spread rose to 1.60. On June 3, 1928 it was 1.67 and the average for 1928 was 1.31. After the formation of the Institute we could not depend upon the movement of the raw sugar market in making our purchases of refined sugar.

[fol. 538] In 1931 we were able to make money in the sugar business by the purchase of hard and lumpy sugars from the refiners. There were 180,000 bags in Chicago belonging to Western which had been tolled by Pennsylvania. The raw sugar belonging to Western was brought to Philadelphia to Pennsylvania who manufactured the sugar and charged Western for so doing. Of this sugar 85% was satisfactory and 15% slightly hard and lumpy. The 85% was sold immediately and the 15% put through our mills. Our first purchase of 40,000 bags was made in 1930 at a 40¢ concession through Lowry. In making the purchase we dealt through Murphy, Chicago manager of Lowry, and Rabjohn, assistant sales manager of Western. The lumpy sugar was crushed at a cost of 10¢ and then powdered at a cost of 12¢.

For the purpose of powdering sugar it makes no difference whether the granulated is lumpy or not except for the additional expense of crushing it. The 85% was as good as other refined sugar.

There is no difference in sugar. Some say that one brand is a little better than another but as far as we were concerned, sugar was sugar.

The sugar was not offered continuously for sale thereafter. Murphy said Western did not want to sell sugar to a sugar dealer because the members of the Institute had been raising Cain with him for selling sugar to us because we disturbed the market price. He said he would sell it to a [fol. 539] manufacturer where he could be sure it would not come back on the market.

After the formation of the Institute it was not unusual for C. & H. and Western to ship by the Panama Canal and Great

Lakes to Chicago because the water rate was so much less. Tennison, manager of Western, said his company received a water rate of 52¢ from San Francisco compared with a rail rate of over 80¢.

In June, 1931, we purchased more of the tolled sugar. I had one of my customers, a manufacturer, do it because Murphy of Lowry said that anyone who was a manufacturer could buy it. The contract to purchase was made by the Thin Shell Candy Corporation of Chicago and I gave a letter guaranteeing we would take the sugar off its hands. We sent our check direct to the broker in payment of this purchase which was made at a concession of 35¢ under the market price. In August of the same year we made an additional purchase of 20,000 more bags at a concession of 30¢. Of the sugar purchased in 1931 85% was first class and 15% was lumpy. It was disposed of in the same manner as that purchased in 1930. Murphy and Hogan of Lowry learned the method by which this transaction was conducted.

[fol. 540] Before and after 1928 when we purchased through a broker checks were sent directly to the refiner. This was the only kind of deal in which the checks were made payable to the broker.

In March, 1929, we contracted to purchase 50,000 bags of sugar from Spreckels f.o.b New York. The transportation cost of that sugar was 32¢. At the same time the rail rate was 51¢. Shipment was made the following April. The condition of the sugar on arrival was as good as any other though some was damaged. Between the time the contract was made and we received the sugar we were notified that our sugars were being loaded at Yonkers at an arbitrary freight rate of 40¢. Spreckels absorbed the difference. At the time Tennison of C. & H. told me of the 40¢ charge and said it would have been better if the 51¢ rate had been kept because the water travel took longer and the sugar was more subject to damage, but that was all protected by insurance. At the time it was still possible to buy f.o.b. refinery and ship by barge.

Toward the end of April all members of the Institute announced that they would re-establish the 51¢ rate and refused to sell f.o.b. New York. We tried to purchase f.o.b. New York from every refiner in the East except Arbuckle [fol. 541] but were unsuccessful.

In August, 1929, I talked with White, sales manager of American. He wanted to know why we were not giving his company any more business and I told him we would be glad to if he would allow us to ship f.o.b. New York. He said he would be glad to but the Institute would not let him. At the same time I talked to Harper, treasurer of Spreckels, and tried to get him to ship f.o.b. New York but he said that Rudolph Spreckels had just become a member of the Institute and they did not want to do anything that would reflect on Spreckels.

After Spreckels was elected president of the Institute we obtained concessions from his company. We came to New York in February, 1930, and talked to Harper and Stone. They wanted to sell sugars in Indiana but I told them that because of competitive conditions we could not do so without obtaining a concession of some kind. Harper said he knew what was going on in Indiana and knew his company would give a discount to get sugars there but wanted to know a way to hide it on the books so that the auditors of the Institute would not find it. I suggested sales f.o.b. refinery but they did not want to do business that way because it could be detected too easily. He said all refiners had their sleuths [fol. 542] watching barge shipments to Chicago. I had talked with Hogan of Lowry who were representing Spreckels at the time and he suggested that Harper and I work out a deal, which we eventually did. It was arranged that we receive a concession of 15¢ per 100 pounds if we paid storage and 10¢ if Spreckels paid storage. The concession was paid by personal checks of several Spreckels' employees to my brother. The arrangement continued until Spreckels closed up.

Jacob Moog, vice-president of Godchaux, came to our office in October, 1928, to sell us sugar. He told me he would like to buy some Godchaux because of the demand in the southern part of the state and he was short of raws. He was interested in purchasing 20,000 bags in the second-hand market. I called in my secretary and told him to get Edgar or Beebe on the wire and he jumped up and said "Not from that source." He admited that Edgar had a concession from Godchaux that ran a year with the privilege of renewal.

I learned from all the refiners of the existence of Godchaux' concession. Fox, McCahan's broker, had heard from Placé that Moog had come into the Institute and said he had

a contract with Edgar for a year with the privilege of renewing it for another year if Edgar saw fit and stated he could [fol. 543] not enter the Institute if this contract was not acknowledged. I understand Revere also had a year's contract with Edgar. Fox said that the Institute members agreed to acknowledge Revere's and Godchaux' contracts provided no more were made.

On April 8, 1931, while there was a Government agent in my office I telephoned Tennison, asking his company to ship by barge. He answered that he was sorry he could not and asked "Why do you ask such a silly question? You know the Institute's ruling on that." I spoke to him on April 4 just before the court proceedings started. He asked me then if I had read about the Government's filing suit. I said I had and he asked "Have they been in to see you yet?" I replied they had and that I had given them all my records and everything they asked for. He said "You were awfully silly to do that. Don't you know that the Institute with all their money is going to win this case and after they win this case, sugar is your livelihood and they will boycott you?" I repeated this conversation to a Government agent and when I called Tennison again he repeated the statement.

At the National Canners' Convention held in Chicago in February 1930 the sugar dealers of Chicago tried to influ- [fol. 544] ence the refiners to establish a 600-bag carload as a minimum delivery to buyers. We gave a dinner and invited the representatives of the refiners. No announcement was made at the meeting but the next morning Cody of Arbuckle said his company would only sell carloads of a 600-bag minimum. The next morning his company endorsed the announcement and later Pennsylvania met Arbuckle's announcement. Tennison got up at the meeting and said his attorney advised it would be in restraint of trade to sell at a 600-bag minimum. Cody said the whole Institute was in restraint of trade if the 600-bag minimum was. The refiners did not meet Arbuckle's and Pennsylvania's announcement and in two weeks it was taken off.

In April 1931 I had a conversation in Cody's office in New York. We discussed the water rate and I told him we were being discriminated against because the refiners used the Great Lakes, thus obtaining a rate of 28¢ and charging us 51¢ with the result that the consuming public in Chicago

had to pay the difference. From April 30, 1929, until May 4, 1931, I had to buy sugar shipped to Chicago by barge and pay the rail rate.

During the Convention I told Cody McCahan had made arrangements for the shipment of sugar for A. & P. by barge. I learned from Berry of Keiser, the broker for [fol. 545] National, they were loading 36,000 bags for shipment by motor barge to Chicago. Cody also thought McCahan was giving that rate to the A. & P. I suggested they establish the water rate and Cody said he had been figuring on it for 6 months. I then went to the office of Pike, vice-president of H. H. Pike & Company, who were brokers for Hershey. While waiting for him I saw a memorandum of Hagerdorn's pertaining to a shipment of sugar by the water route, and, after talking with Pike, I returned to Cody's office and told him what I saw. That helped bring about the change of rates and on May 4 Arbuckle announced their selling price in Chicago would be based on a 36.1 rate. The other refiners followed.

Fox of Keiser & Company said that C. & H. had an announcement out to change the rate back to 51¢ but on advice of counsel were going to wait until this case was over before they made a change. The brokers for American and C. & H. advised me to stock up on sugar at the 38.1 price because the refiners had told them that the rates would be changed to the former price of 51¢.

I first met Chinal in March, 1930. He came to my office and wanted to look at my books but I refused him permission. In trying to obtain information from me he told me how he found out that Brower and Fuller of Indiana had [fol. 546] sent sugars to Michigan December 17, 1929, and they were not actually billed by National until March, 1930.

Cross-examination.

By Mr. Peck:

In 1930 Chicago Sugar Company was formed as a holding company for the Powdered Mills. Both of these companies are located at 358 W. Harrison Street, Chicago, and occupy 20,000 feet of space, though the amount varies with the conditions of trade. There is no division between the space occupied by the Sugar Company and the Warehouse

Company, except fire doors which were not pulled down until recently. Usually they were left open.

The only regular employees of the Warehouse Company were its officers, but both the Warehouse Company and the Powdered Mills had separate payrolls. A laborer worked at intervals for the Powdered Mills and for the Warehouse Company. The Powdered Mills had regular employees and prior to 1930, 20 people were on its payroll. The employees of the Powdered Mills worked for the Warehouse Company at times but received no additional compensation for doing so.

If sugar were ordered from the warehouse our traffic man would make up the orders. The brokers of the various refiners then released the sugar. If sugar were ordered [fol. 547] from the warehouse for the Powdered Mills the traffic manager of the Powdered Company or I made up the order and the brokers of the various refiners released the sugar. Sugar which was being delivered by trucks to a customer was loaded by employees of the warehouse under the direction of our superintendent, Frank, who was also an employee of the Chicago Powdered Mills. When sugar was delivered from the warehouse to the Powdered Mills the employees of either might make the delivery.

Practically every jobber in Chicago draws on the Illinois Warehouse for sugar. The Sugar Company does a general merchandising business. The Illinois Warehouse never did.

After the Institute the Powdered Mills did not operate in as wide a territory because the refiners refused to deliver freight bills to us unless we told them the names of the customers, a thing we refused to do, and paid the prepaid rate to the given territory. In instances where sugar was not sold f.o.b. refinery, and the refiners were absorbing part of the freight, I deducted the amount absorbed from the invoices when I paid them. The refiner paid the freight on sugar which we were transiting through [fol. 548] Chicago and we paid the additional amount to destination, the additional amount being the balance of the through rate. Since the Institute was formed and we were not allowed the transit privilege, our sales were restricted to Chicago and we were made purely local dealers. We did not sell anything more in Indiana.

Prior to the Institute sugar was consigned to my warehouse and the freight bill was registered with the Western

Weighing & Inspection Bureau in the refiner's name. Later the consignee, a broker representing the refiner, endorsed the bill of lading to the warehouse. In this manner I was able to ship sugar into a given point for less than the refiners charged. Consequently the jobbers in that point bought from us and we competed with the refiners.

The refiners, by charging a rail-and-lake or all-water rate instead of an all-rail rate, could have competed successfully with me at points distant from Chicago.

I never purchased sugar f.o.b. the refinery, except one purchase of 50,000 bags from Spreckles in March, 1929. It was not shipped until April 24 and did not arrive in Chicago until early June because it was caught in high water. In April, 1931, I spoke with Tennison, general manager of the sales department of Seavay & Flarsheim Brokerage Company, who represent C. & H. in Chicago, over the telephone and asked for an f.o.b. shipment, which he refused. I am not familiar with the Institute's recommendations in [fol. 549] regard to shipments over differential routes and when Tennison said "You know what the Institute rulings are in the matter" I thought he was referring to what everyone else was saying, that if shipments were wanted, the refiners would say "The Institute won't let us ship".

Mr. Peck: The Code Interpretation, paragraph 4, subsection 1, providing:

"The customer always has the right to order f.o.b. refinery point, taking the slowest service at his own cost and risk of the market during transit"

was repealed September 25, 1930 and was not in force at the time of this alleged conversation. I had conversations with Berry of Charles E. Keiser & Company regarding f.o.b. shipments. I spoke with Dowry and the sales manager of American in New York. I heard the same story,—that the Institute would not let them ship, and when I tried to get that in a letter they would say "We will have to have our legal department advise us on that".

I also had a conversation with Cody of Arbuckle on April 24, 1931. I told him that I had learned through Keiser that McCahan had hired two boats and was loading 36,000 bags at Philadelphia to go through the New York Barge Canal and told him I thought A. & P. was getting the difference between the actual prepaid freight rate of

51¢ and the barge rate of 30¢. Cody said he had been figuring this thing and working on it for about 6 months. On May 4 Arbuckle put into effect the barge rate.

The 180,000 bags of sugar belonging to Western was refined by Pennsylvania and placed in its bags. Our first [fol. 550] purchase was made in the fall of 1930. The sugar had arrived the year before by barge. I made another purchase of 50,000 bags in June, 1931, and a further purchase of 20,000 bags in August of that year. Of all the sugar I bought 85% was good sugar. The balance was hard and lumpy. The existence of this stock was well known among brokers in Chicago. I have been in the sugar business quite a while and I never heard so much of hard, lumpy and frozen stocks as I have since the Institute was formed. I had never heard of frozen stocks before the Institute was formed.

The contract for the purchase of sugar from Federal was made March 9, 1929, but the first shipment did not start until April 24. The rate was 34¢ less 2¢, but on April 22 all the refiners put into effect a 40¢-rate. Tennison of C. & H. was the first to tell me and for that reason I supposed that C. & H. originated it. I am surprised to know that Great Western was the originator of this rate. Great Western is not and has never been a member of the Institute but it has been a member of the Domestic Sugar Bureau, which worked closely with the Institute.

The sugar bought from Federal and put through the Powdered Mills was not transited. I have never transited powdered sugar because there is no transit rate. We always have to pay the local rate to destination on such shipments.

At the National Canners' Convention in Chicago in Jan- [fol. 551] uary 1930 most of the refiners were present. There was a meeting of all the sugar merchants, including Durant, Pinker of the Sugar Supply, Childs of W. F. Childs & Company, and ourselves. We felt we were being discriminated against and were trying to obtain the cooperation of the Institute to put through a ruling in their Code of Ethics that they would sell only a minimum car of 600 bags or to make a service charge on less than carload lots. Pennsylvania and Arbuckle adopted our suggestion by putting into effect a ruling that so far as they were concerned delivery from consignment would only be made in carload

lots. The other refiners did not follow so Arbuckle and Pennsylvania had to withdraw.

Petitioners' Exhibit 61-B was received in evidence.

The figures in Exhibit 61-B have been compared with those of Willett & Gray. The 1928 list shows that between May 31 and June 7 the refiners' margin rose from 1.469 to 1.678. At the same time the price of raw declined. Such a jump in the margin is unusual. In June 1927 the margin rose 22 points, one more point than in 1928, and at the same time raw went down. There was a difference in the [fol. 552] situation in 1927 and 1928 because in the former year the condition existed for weeks and in the latter for months. The margin of 1.678 which existed in June 1928 declined to 1.201 in less than 2 months. The average margin for the year 1927 was only 1.09 compared with an average of 1.35 in 1928. This was because the Institute was holding the price up and that is when we started to object. Until the time we started objecting the raws were going down continuously and the refiners were holding up the refined market. After they found we were kicking there were some terrible drops. We were kicking in 1927. We were always kicking with the refiners from whom we were buying refined sugar.

We charged the refiners 7¢ a bag storage for sugar. It costs us about 4¢ to store it. The profit which we made on warehousing was not passed on to our customers. Every jobber in Chicago has a warehouse. Today there are only 4 jobbers because the Institute put the others out of business. Formerly there were 23 of them.

Our warehousing profit did not enable us to sell sugar for any less than if we did not have a storage warehouse [fol. 553] because we did not pass it on to our customers. Otherwise we would have been doing the warehousing for nothing and we were in that business for the purpose of making money. The 3¢ storage profit had nothing to do with the selling price of sugar. The profit made by transiting and the price concessions enabled us to sell to the consuming public for less than the refiner was charging. The reason for bringing sugar into Chicago by water was to give the consumer in Chicago a cheaper price.

Defendants' Exhibit I was received in evidence.

I discussed the sending of Exhibit I with my brother and at the time it expressed my sentiments and still does. I

want to be on an equal basis with my competitors and if I can get a concession I will take it.

Defendants' Exhibit J was received in evidence.

I saw Exhibit J before it was sent out. At the time it expressed my sentiments and it still does.

Redirect examination.

By Mr. Rice:

Prior to the formation of the Institute we transited sugar to points outside of Illinois with the knowledge of [fol. 554] the refiners. They knew that we were engaged in the warehousing business. There was no attempt on our part to keep this a secret. All the officers of our company were officers of the Illinois Warehouse Company. We still operate a warehouse and store sugar but do not store it for refiners on consignment. They said the Institute did not allow them to ship into our warehouse.

Our warehouse had 5 stockholders. Our subsidiary, Crystal Sugar Company, which is engaged in selling sugar to the retail trade, had 15. A. D. Macomber and C. W. McConnell owned stock in the Crystal Sugar Company. The former also owns the Railway Brokerage Warehouse and several other warehouses in which sugars are stored. McConnell was president of the affiliated warehouses. In April 1930 Douglas of the Domestic Sugar Bureau and Tennison told these two gentlemen if the Crystal stock was not sold in 48 hours no sugar would be shipped to their warehouse. They resigned as directors and sold their stock to me.

Recross-examination.

By Mr. Peck:

In obtaining consent for the transiting of sugars we spoke with brokers representing the different refiners.

With the exception of American all transiting bills were obtained from the brokerage houses.

[fol. 555] Sherman L. Brown was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I am vice-president and production manager of the Dr. Pepper Company of Dallas, Texas. We produce and distribute through the South and Southwest a soda beverage known as "Dr. Pepper." I have been with the company since July 1, 1919, and have handled the purchases of sugar since 1921. We buy sugar from Imperial, C. & H., Colonial and American.

We prefer some refiners' sugar to that of others because some has bone char that has to be skimmed off and some has more lint. We always prefer the sugar that is easiest to use.

Prior to the fall of 1928, the assessed freight basis from New Orleans to Dallas was 69¢ per 100 pounds. The actual freight rate was 45¢, but the refiners were charging the prepaid basis. From Sugarland, Texas, to Dallas, the actual freight rate was 39¢ so that we were paying approximately 30¢ more than the actual cost of transportation from Sugarland. From December 1929 to April, 1930, we were paying 56.6¢ to Dallas, and from the early part of April, 1930, to April 1, 1931, we paid a reduced rate of 48.4¢.

[fol. 556] The cheapest rate available to the Dallas trade by transiting sugar through Texarkana is 42.3¢, and we shipped some sugar that way until forbidden. Arrangements for transiting were made by Harry Oliver, of Oliver & Taylor, brokers for Seavey & Flarsheim, the sales agency of C. & H.; and W. W. Overton & Company, of Dallas, broker for Imperial.

In December 1929 and January 1930, I arranged without the brokers' assistance but with their knowledge, with the railroad to ship sugar to Texarkana consigned to ourselves, and before ariving there, ordered it shipped to Dallas.

If we could have purchased f. o. b. the factory, the rate of 39¢ would have been cheaper than the transit rate through Texarkana, but since the refiners refused to sell f. o. b. the factory and added more than the 39¢ for freight delivered to Dallas, it became cheaper to transit through Texarkana.

I do not know why the refiners did not object to our procedure. They knew sugar was coming to us at Dallas, that we paid for it at the Dallas office and that we had no branch

at Texarkana. This method was used in December, 1929, and early in January, 1930, in dealing with Imperial and C. & H. which had a consignment point in Houston. We [fol. 557] even bought one car through Imperial on which we had shipments made direct from the factory at Sugarland to our factory in Dallas, and they assessed the Sugarland prepay rate of 39.1. I was able to get this one shipment at the low rate by telling them I thought I could persuade some of the other refiners to give the same rate. I made further endeavors but found the Institute would not allow them to ship that way. The sugar was used in our business. None of it was resold.

In trying to arrange for other purchases, I spoke with William M. Hall, sales manager of Imperial, and their broker, W. W. Overton, Sr. The first conversation was in April 1930 when Hall and Overton came to pay us a visit. I asked when he was going to ship me sugar f. o. b. Sugarland and he said, "Well, you know, Mr. Brown, I can't do that. The Institute will not allow us to ship you sugar that way."

Defendants objected to witness testifying concerning conversations with Hall on the ground that Hall's statements were not within the scope of the sales manager's authority, that the agent's actual knowledge of the facts was not shown and that there was no evidence to show the principal had authorized such an admission. The objection was overruled and an exception taken.

I have known Hall intimately since 1921. He has been manager of Imperial and sold sugar to me. I asked him why I could not buy in Houston where the freight was a little less and he said, "The Institute will not let us ship that way unless we charge the regular Dallas prepay. If you are going to take it at Dallas we have to assess the Dallas basis."

[fol. 558] In the spring of 1931 a similar conversation took place with W. W. Overton, Jr., who said he could not ship f. o. b. refinery but would like to make some kind of an arrangement whereby he could take care of me in some way. He said that little things might be fixed up to our satisfaction but that Imperial was bound by rules and, as members of the Institute, had to live up to them. In neither of these conversations was anything said about discrimination or unfair practices. I have discussed the matter with

Oliver many times, but since the C. & H. refinery is at Crocket, California, they ship by boat to Houston, and I figured we could not save much unless they were willing to meet the prepay actually existing between Dallas and Sugarland.

Cross-examination.

By Mr. Browning:

Prior to the summer of 1928 the freight rate, also known as the refiners' prepay, including the cost of the container and the 2% cash discount, was 69¢. The actual freight rate was 67¢. The actual freight rate from Sugarland to Dallas during the same period was 38¢, but the refiner there charged the New Orleans rate of 69¢.

I never tried to buy f. o. b. the refinery prior to 1928. In the summer of 1928, the prepay charge from Sugarland to Dallas was reduced from 50¢ to 38¢ and from New Orleans to Dallas from 67¢ to 58¢.

[fol. 559] On all purchases of sugar since 1922 we paid the New Orleans rate, except for the few instances I have mentioned. I understood that refiners were selling sugar in Texarkana on a destination basis. I understood that our contracts with the refiners provided that a certain amount had to be paid for transportation. This condition existed from 1922 to the present, with the exception of the direct shipment in 1930 and those which were transited at Texarkana.

The contract with Imperial on the shipment made in January 1930 provided we pay the New Orleans rate to destination, but we did not do so. The C. & H. shipment was not on the usual terms of base price plus freight application, but on the base price plus the best rate we could obtain, because their brokers were assisting us in beating the freight rates.

I do not know whether I could buy f. o. b. Crocket, California. I never tried. I have never tried to buy f. o. b. New Orleans, and I am not trying to buy f. o. b. Sugarland today. Some of the sugar purchased from Imperial and transited through Texarkana was stored in Texarkana while in transit.

I recall one instance where we diverted a car. At the [fol. 560] time the freight application to Texarkana was

40¢ and the rate from Sugarland to Texarkana 38¢, plus an additional 3¢ to get the sugar to Dallas. The freight application at Dallas at the time was 56.7¢. There was a saving of 11¢ because the freight application at Dallas was 55¢ and that to Texarkana 44¢. We had no reason for storing sugar in Texarkana and were not interested in using the transit privilege, except to reduce the cost of sugar delivered at Dallas. The freight application at Texarkana was 40¢ because the barge rate from New Orleans to that point was 40¢.

I never tried to buy f. o. b. New Orleans because we prefer to do business with Texas refiners; but I do not mean I tried to buy f. o. b. New Orleans and could not do so. Since the freight application at Dallas was the New Orleans rate or less than the New Orleans rate, I had no motive for buying f. o. b. New Orleans.

These transactions were made through brokers. There was no contact with the refiners. I understood that the broker received a fixed commission, which was the same from whatever point the sugar was shipped. It did not strike me that the brokers' interests in these transactions were averse to the refiners'. The refiner lost 11¢ which he would have collected if the contract terms had been fol-
[fol. 561] lowed, but that amount did not actually belong to him as I saw it, because it was a profit on the freight that he had no business to make. It was unnecessary for the broker to use this as a sales argument because we have to buy sugar anyway.

The first man who approached me with the idea was the C. & H. broker, and then I talked about it to the Imperial broker and said, "Why haven't you been giving me the benefit of this knowledge?" As a sales argument to persuade us to use C. & H. sugar instead of Imperial, which we were then using for the most part, the C. & H. broker agreed to transit and divert cars for us.

The effect of the transiting was just the same as if we had been given a 12¢ reduction in price. Hall did not mention the Institute rule that a refiner had to adhere to his openly announced prices. C. & H. and Imperial knew those shipments were being transited or diverted because Oliver told me he told them. He said it was being done by other buyers of sugar with the full knowledge of the refiners and that they were holding back something which he wanted to tell me. He said the refiners were all aware of it, or I

thought he was referring to the refiners. Perhaps he meant the Seavey & Flarsheim Agency—I am not sure. However, I knew the refiners were aware of it because J. P. [fol. 562] Stewart, Chicago sales manager of C. & H., was in Dallas about that time.

Hall did not tell me that the sugar which Imperial sold at the Sugarland basis was sold on publicly announced terms which provided the actual rate from Sugarland to Dallas would apply to purchases on the move of December 23, 1929.

Since the Institute was formed the only changes in the freight application at Dallas have been downward, and today they are lower than ever before. The first reduction took place in 1928 and there were two more in 1931.

Petitioner's Exhibit 61-C was received in evidence.

[fol. 563] RUSSELL R. ROBERTS was called as a witness on behalf of the Petitioner.

Direct examination.

By Mr. Fly:

I was employed by W. F. Childs, sugar merchants, as a salesman from 1920 to 1929 and as a branch manager of the Indianapolis office from 1929 to September 1931. Their main office was in Chicago and they had one branch in Indianapolis and one in St. Louis. From 1929 to 1931 the Indianapolis branch sold on the average of 20,000 bags of sugar monthly. Our sales were generally made to retail grocery stores and manufacturers. We purchased our sugar from the defendant refiners. The average size of our orders was 9 bags.

Before the middle of 1929 Childs stored sugar only for the refiners' account. The refiners usually stored with the distributor who handled other commodities if he had the available space and cartage facilities.

Prior to 1929 there were about a dozen towns in Indiana in which these consigned stocks were held and upon which we drew. We operated in this territory without warehouses and without the expense of maintaining sugar stocks. In the early part of 1929 all these consignment

points were eliminated except Indianapolis and Evansville. The only point retained in our territory was In-
[fol. 564] dianapolis.

Lamb, Indianapolis representative of Kenneth L. Fox & Company, brokers for McCahan and Edgar, told me of the elimination of these consignment points.

The stocks in the consignment points were not withdrawn at once but were permitted to dwindle. After the various towns were eliminated we took over the business of maintaining those stocks of sugar. The list with a few exceptions was the same as before. Childs paid the warehouse and other charges attendant upon the storing of sugar. In Indianapolis we delivered sugar exclusively but in the other branches handled rice and beans. The branches in St. Louis and Chicago also operated consignment points.

After the elimination of consignment points our volume of business increased, due to the sales of sugar to A. & P. and Kroger.

Our gross margin on the sale of sugar was 20¢ a hundred pounds. We expected a net margin of 5¢ a hundred. After the elimination of these points we paid the warehouse charges of 5¢ a bag, stood the loss on account of damaged sugar and took the risk of market declines.

Today Childs & Company is in the process of liquidation,
[fol. 565] which started in September, 1931.

Prior to July 1, 1930, the Advance Transfer & Warehouse Company of Indiana held the consigned stock of sugar on which we drew. We had a trucking contract with them at the rate of 5¢ a hundred. This company only handled the warehousing and delivery of sugar. In the early spring of 1930 the company was investigated by Chinal of the Institute and after July 1 we shifted our stocks to another warehouse and made other arrangements for local deliveries. Under the new arrangement the rate was 6¢ a hundred.

Cross-examination.

By Mr. Higgins:

We had to pay a higher rate after severing relations with the Advance because of lack of competition. The new company, Indiana Terminal Trucking Co., was the only one

to go to because it worked with a warehouse which stored sugar. I do not know why Indiana charged more for trucking than Advance did.

I know nothing of the financial affairs of Childs & Company nor do I know of all the factors that contributed to their failure in 1931. I felt there were other factors besides the changes in the matter of consignment warehouses. I do not know whether the company failed in 1922 nor [fol. 566] whether it had an adequate capital to carry on its business or was attempting to carry on business without adequate cash capital. It was always my impression that it was chronically short of cash.

Redirect examination.

By Mr. Fly:

I do not know the other factors which contributed to the downfall of Childs & Company. I did not state on direct examination that any particular thing caused it. My idea of its financial standing was an impression which was not based on facts.

[fol. 567] JOHN B. MEIER was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

John Weiss and myself are partners operating the John J. Meier Company, distributors of sugar, flour and cereals. We operate in St. Louis and vicinity.

Prior to the formation of the Institute we bought cane sugar from refiners operating in New Orleans and California. We bought from American at a concession of 5¢ per 100 pounds.

Sugar was purchased on 30-day contracts and shipped by rail or barge at our option. We paid the rail rate for rail shipments and the price was guaranteed until date of arrival. We paid the barge rate for barge shipments and the price was guaranteed for 10 days after date of shipment. The terms of payment on rail shipments were 2% 7 days

after arrival. On barge shipments they were 14 days from date of shipment. We had the same payment and shipping terms but not the same concessions with other refiners in New Orleans. It takes a barge shipment from 14 to 30 days to come from New Orleans to St. Louis and a rail shipment 7 days. The barge rate was 40¢ and the rail rate 50¢.

[fol. 568] The 5¢ concession granted by American continued until January 1928, when we received a wire stating it was to be discontinued. Nothing was mentioned about the freight rate. The telegram just stated that the allowance of 5¢ was withdrawn and made mention of abiding by the Code of Ethics.

We bought sugar from Godchaux f. o. b. refinery prior to the formation of the Institute under a 10¢ per hundred concession from the list price.

Petitioner's Exhibit 62 was received in evidence.

The terms in the contract of shipment, Exhibit 62, meant the actual rate. If I wanted to ship by rail I paid the rail rate; if I wanted to ship by barge, I paid the barge rate. We paid for the sugar 2% 7 days after arrival whether by barge or rail and in that respect it was better than our contract with American. Godchaux' price was guaranteed to be equal to that of American and C. & H. on the date of arrival. In January, 1928, the contract was cancelled. I am unable to locate the notice.

It called attention to the Code of Ethics and stated that Godchaux was taking advantage of its 10-day clause in the [fol. 569] contract.

We did not deal exclusively with Godchaux because American sugars were advertised in our market and there was a demand for them. Godchaux only manufactured bulk sugars but American had a general line of packaged sugar which was advertised.

Because National brands sell more easily than brands that are not advertised, in most cases we have to sell non-advertised brands lower.

In 1930 contracts were changed from one contract to two contract arrangements. Prior to 1930 you could designate a certain number of bags on a move and then ship it either by barge or rail and the rail rate was to apply on rail shipments and the barge rate was to apply on shipments by

barge. In 1930 you had to designate shipments by barge at the time of making the contract if you elected to ship by barge and you had to separate the contract if you shipped by rail.

If you took a rail contract the price is guaranteed to the date of arrival or withdrawal from warehouse and the price is 2% 7 days after arrival. If you shipped by barge there was no guaranty whatever and the payment terms were 14 days after date of shipment.

In these 30-day contracts we were still buying f. o. b. but the guaranty terms were changed.

[fol. 570] Petitioner's Exhibit 63 was received in evidence.

The terms of the other refiners in respect to barge shipments were identical.

In 1930 I went to the brokers and other representatives in St. Louis and attempted to obtain a guaranty on barge shipments. I thought we were entitled to it, at least up to the date of arrival. I could not see that it made any difference to the refiners, if they still had the sugar on hand, whether it was shipped by barge or by rail. The guaranty on rail shipments was 10 days after date of shipment before the Institute was formed. If we bought spot sugar or took it from consignment we paid the actual rate of 50¢ regardless of how it was shipped to St. Louis.

Barge shipments of sugar never went into the warehouse because we purchased f. o. b. New Orleans.

In 1930 we asked that rail shipments be delivered to us direct and that we be allowed a concession of 5¢ for the month's storage the refiners saved by not having to put the sugar in a warehouse. The request was denied.

Our volume of sales ran from 200,000 to 300,000 bags a year but in 1931 it fell off to 100,000 bags.

Cross-examination.

By Mr. Browning:

It was customary for American and Godchaux to allow [fol. 571] concessions of 5¢ and 10¢ similar to ours to some but not to all of our competitors. The price guaranty, unlike the other concessions by American, was given to everyone in St. Louis. Not all of Godchaux' customers received

the price guaranty to the date of arrival on contracts like that of Exhibit 62. They had other contracts. This was a contract which called for a certain amount of sugar to be taken monthly. It was open to purchasers who would take as much sugar as I did. I do not believe all my competitors in St. Louis were on equal terms with me in 1927. I thought they had better arrangements than I did.

After January, 1928, I thought all refiners gave the same rates and guaranties to all buyers.

In 1930 the refiners announced a change in guaranty contracts, depending upon whether shipment was to be made by barge or rail. I was always free to buy f. o. b. New Orleans and pay the barge rate on barge shipments without a guaranty and the rail rate on rail shipments with a guarantee. That situation has not changed from 1928 to date other than we can get a barge rate today on rail shipments. On May 6, 1931, an arbitrary barge rate went into effect on all shipments of sugar regardless of the manner in which it was shipped and prices were guaranteed for 42 [fol. 572] days after the contract was made. The freight application at present is as low as it has ever been. The guaranty against price decline was changed in 1930 so as to include barge and rail shipments.

I considered my request from the refiners asking for the 5¢ saving in lieu of storage as an allowance rather than a concession. I felt that since I took shipments direct that I should have preference over the competitor who by taking deliveries from consignment had caused the refinery an expense. I paid the same price whether delivery was to me or whether it was from consignment.

Redirect examination.

By Mr. Rice:

From 1930 until May 5, 1931, guaranty by rail and non-guaranty by barge were in effect. After the latter date the arbitrary rate was established and prices were guaranteed on both shipments.

[fol. 573] Louis A. Parker was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I am president of the L. A. Parker Company of Evansville, Indiana. Our company engages in the brokerage of dried foods, canned foods, sugars, etc. We have been cane sugar brokers for years and handle about 250,000 bags per year.

Chinal came around to my place in September 1930 and again in December, investigating warehouse stocks of sugar. Upon request from him I gave him permission to take a few of our contracts from our records to the hotel where he was staying in order that he might work on them. The next day when we went to look for certain of our other contracts, we discovered that they were gone. About 4:30 Chinal come into the office with his arm loaded with those papers, which he had taken without our knowledge and without our authority. My secretary told him what she thought of him and told him to get out of the office, which he did.

At the time of his visit Chinal presented a form letter by which a number of cane refiners authorized him to check our records.

Our principals are Lamborn, Savannah and Colonial.

Chinal was trying to find out whether the American Patent Corp., a large customer of ours, got the barge rate or the rail rate. He was examining the contracts made with this concern for Colonial. We had no special word from our principals authorizing Chinal to make the investigation.

Sterling Products Company operates a general business including a warehouse. It has $400,000 of paid-in capital and an investment of $1,000,000. I own $5,000 worth of common stock which I purchased in 1922. I was never an officer or director of the company. With the passage of the Eighteenth Amendment the breweries closed and the company had to seek other uses for their buildings. They went into the manufacturing of ice, cold storage, dry storage and the manufacture of malt extract. They had 2 warehouses, one of which alone is worth $400,000. It is a very centrally located and well-built building. I have never had any complaints as to the method of operation of that

[fol. 574] warehouse and I carried consigned stocks of other food products in it. My principals had knowledge of this arrangement and have never complained about it. The storage of such consigned stocks is a frequent thing in the food industry. I never knew of the sterling making an unauthorized rebate on any of the goods it handled. I stored sugar there from approximately 1924 on.

I met Van Buren of the Institute in Evansville during November, 1930. He told me he came there to put in an arrangement regarding warehouses and called a meeting of all the brokers in Evansville who dealt in refined sugar.

I was present at the meeting which was attended by Kriekhous, C. A. Humphrey, H. O. Amos and Walter Block, all of whom were sugar brokers. Van Buren said he wanted to work out something as to the warehousing situation in Evansville, asked us where sugars were stored and said he wanted to eliminate certain warehouses. He directed his remarks to me and wanted to know if any of my relatives or employees had any connection with Sterling and I told him "no", but that I had $5,000 worth of its stock and he said "Well, that lets Sterling out".

[fol. 575] Petitioner's Exhibits 64 to 67, inclusive, were received in evidence.

These exhibits do not represent my idea as to what happened at that meeting. I told Van Buren I did not care whether or how many warehouses did any storing. They all voted on the situation and I voted for every one of them, including my competitors' warehouses, so the statement that Van Buren made to the Institute, that it was agreed only to have so many warehouses, was a misstatement in that I did not agree to eliminate any. That is a matter of record at that meeting. The second meeting took place 2 weeks later. The same brokers, except Amos, were present. At this meeting they again brought up the warehouse question and I repeated my original statement, that I did not have anything against any warehouse. I was only interested in my own business and insofar as I was concerned they could store any place they wanted to. I would not or did not go on record against any warehouse. They asked me if I still owned stock in Sterling and I said that I did.

This group selected warehouses in accordance with Van

Buren's request. A remark was made at the meeting that [fol. 576] I owned stock but that I could not control a $400,000 corporation with $5,000 of stock and insofar as those present were concerned Sterling was all right and that they would recommend to the Institute that it be placed on the approved list. I told them I did not care what they recommended. I do not remember what other warehouses were recommended because I did not pay much attention.

Petitioner's Exhibits 68 and 69 were received in evidence.

I signed the broker's pledge, Exhibit 70, which was forwarded to me by my principal.

Petitioner's Exhibit 70 was received in evidence.

I signed it because I wanted to sell sugar. It was sent to me to be signed but I do not know where it came from.

Petitioner's Exhibits 71 and 72 were received in evidence.

Cross-examination.

By Mr. Peck:

My office is located in the building of Sterling. I occu- [fol. 577] pied a whole floor and paid $25 per month for light, heat and janitor service. I do not know the value of the building.

Savannah and Colonial stored sugar in the Sterling warehouse. We are brokers for both of these companies and as far as I know they have no other broker in Evansville. All deliveries from consignment of Colonial and Savannah were issued exclusively by my company. The reports of withdrawals went to the refiner. The warehouse sent the original copy of the withdrawal to the refiner direct and the carbon to me as broker. My company reported to the refiner the fact of the withdrawal so that the refiner had or should have had two checks on it. I gave the warehouse instructions to report to the refiners direct but I don't know whether or not they were carried out. When we reported to the refiners withdrawals of stock from Sterling we did not consult the warehouse reports of the withdrawals to the refiners. Our organization did not check with the warehouse prior to advising our refiners. I do not know whether the reports coincided but have every reason to believe they did because we never received any complaints.

At the November 25 meeting all brokers were present and there was a discussion of all warehouses which were selling [fol. 578] sugar. Van Buren asked for recommendations as to warehouses in Evansville which were not affiliated with a sugar buyer or sugar broker.

The Sterling warehouse was up for discussion. I voted specifically to recommend the use of all warehouses. They voted that every warehouse was satisfactory. Van Buren said "You fellows have another meeting and I will send my report in but I will be guided by your recommendation at the next meeting." The question of affiliation was discussed and I voted on that question. I voted that the warehouse was all right and that Sterling was affiliated (with a sugar broker). The meeting was unanimous in that respect.

At the second meeting we discussed the warehouses the refiners should use to store their sugar. I do not remember discussing the question of affiliations at the second meeting because I was not interested. Colonial and Savannah never stopped storing sugar in Sterling and they are doing so today.

I do not have the original copy of the specific broker's pledge which I signed. I believe I signed one for Colonial and one for Savannah. The pledges probably came from Lamborn and were returned to the sender. I am a member of the National Sugar Brokers' Association.

[fol. 579] Redirect examination.

By Mr. Fly:

The refiners continued their consignments in our warehouse because we satisfied them that Sterling was all right. I talked to Newman of Colonial and Taylor of the Institute about it and told them that I had transferred my stock in the Sterling. I made a trip to New York and explained the situation to Newman. Newman, Keiser and myself went over to the Institute office and they told Taylor that I had satisfied them that Sterling was all right and that they were going to continue to ship sugar to its warehouse. I brought an affidavit from the Warehouse Company that I had transferred my stock.

Petitioner's Exhibits 73 to 102, inclusive, were received in evidence.

[fol. 580] ALBERT PRITCHARD was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I have been purchasing agent for the Coca-Cola Company of Atlanta, Georgia for 8 years.

The cane sugar refiners have told us that our company is the largest consumer of sugar in the country. Coca-Cola is in a strong financial position and pays its bills promptly. My company customarily makes payment in time to take advantage of the 2% cash discount. It manufactures Coca-Cola syrup and carbonic acid gas. Our beverage output leads all others in this country. Company plants are located in New York, Baltimore, Atlanta, New Orleans, Dallas, Chicago and Los Angeles.

We use cane sugar in manufacturing. The number of bags used annually by our company is as follows:

1926	1,240,000 bags
1927	1,390,000 bags
1928	1,480,000 bags
1929	2,250,000 bags
1930	1,100,000 bags
1931	1,760,000 bags

Prior to the formation of the Institute, our company did business with the defendant refining companies. Approximately 65% of it went to American during the years 1926 and 1927. Since 1928 American has received none of our business. In 1926 and 1927 Hershey received about 3% [fol. 581] of our business. Since the formation of the Institute it has done 60% to 65%. Prior to the formation of the Institute we gave no business to Sterling, a local refiner located in Louisiana and not an Institute member, but in the 3 years since the Institute's formation we have purchased 800,000 bags.

We shifted from American to Hershey and Sterling because we received better terms. Some of the terms received from the defendant refiners prior to the formation of the Institute were as satisfactory as those which we have since received from Hershey and Sterling, and some were about the same. Since the formation of the Institute we have

been unable to obtain as satisfactory terms from the defendant refiners as we did before.

Our company purchases in one or more carload lots. We maintain our own warehouses for the storage of sugar in Atlanta and Chicago. Sugar used in other plants is stored in public warehouses for the account and at the expense of Coca-Cola. Our company does not draw upon consignment stock maintained by refiners at those general points.

We have never sold a bag of sugar and only distribute that which we purchase for our own company.

In dealing with the defendant refiners before the Institute we traded on a mutually agreed basis which was lower [fol. 582] than the published market price of refined sugar. Sometimes we played one competitor against another. From March 7, 1928, to March 30, 1931, we received no price concessions from the refiners.

After January 7, 1928, we entered into tolling contracts. We bought the raws and gave them to refiners who delivered refined sugar to us at a certain advance in price. We had a tolling arrangement with Colonial and Garcia Beltran, a Cuban Company. The latter is a raw sugar producer for whom Savannah refines. We paid Garcia and Colonial for the refined sugar.

During the same period we had a tolling contract with Sterling and for the purpose financed them to the extent of $1,000,000. Sterling purchased the raw sugars which were in a bonded warehouse. Before they were withdrawn, Sterling sent us a note bearing 5% interest to pay for the amount being withdrawn. We advanced the face of the note and returned the warehouse receipt to Sterling who paid for the sugars and refined them. The transaction was not strictly a tolling arrangement because the raw sugar was never ours but the price was net, and not subject to a discount.

Petitioner's Exhibits 103 to 116, inclusive were received in evidence.

[fol. 583] I do not recall any arrangement for price concession or discount with any of the defendant refiners subsequent to March 30, 1931.

Prior to the formation of the Institute, we were able to make long-term future delivery contracts, but we have been unable to do so since. We used long-term contracts

because we wanted a fixed price for the cost of raw materials over a period of time as far ahead as possible. We also took advantage of such a contract in order to secure favorable prices on market moves.

Petitioner's Exhibit 117 was received in evidence.

We received messages similar to that of Exhibit 117 from the other defendant refiners at the same time.

Prior to 1928 we were able to make contracts for the delivery of sugar at the buyer's call, but we have not been able to do so since that time. Since the formation of the Institute we have been able to make contracts with Hershey for future delivery beyond 30 days. On May 2, 1929 we bought 10,000 bags of spot sugar from Cuban American.

During 1929 we purchased sugar from Hershey and [fol. 584] others under a contract providing for storage by the refiner for a period of 30 to 60 days. The storage arrangements were very satisfactory and slightly more reasonable than we could get from other refiners. We were unable to get from any of the defendant refiners a rate as low as 1¢ per bag per month.

Petitioner's Exhibit 118 was received in evidence.

Hershey has a warehouse at Brunswick, Georgia, and the freight from Brunswick to Atlanta is the same as from Savannah to Atlanta. When Hershey loads the cars at Brunswick and receives the bill of lading from the railroad, its responsibility ceases and the sugar is ours. Therefore, we put delivery for Brunswick rather than Atlanta, and paid the carrying charges between those 2 points. In July, 1929, competitors bought sugar at the same price we did but did not receive the storage privileges and delivery over a 6-month period.

Petitioner's Exhibits 119 to 131, inclusive were received in evidence.

The provisions of the contracts with American during 1926 and 1927, which gave us a brokerage allowance of 5¢. a bag did not appear upon the face of the contract. We [fol. 585] obtained the allowance because the business was not transacted through a broker.

As far as I know, our company has not complained about sugar prices which the refiners have given to other com-

panies. Prior to the formation of the Institute most of our purchases were made f. o. b. refinery.

After receiving Exhibit 117, I tried to persuade Brownlee to do business on the old basis and have continued ever since, but without success. I then got in touch with Sterling and visited Hershey in Cuba. I told him that we would give his company a large share of our business, providing we received terms similar to those which we had heretofore received.

After the formation of the Institute, I shopped among many of the defendant refiners trying to buy sugar on the terms we previously received, but they refused to give them. I got in touch with Savannah, Godchaux, Imperial, American and C. & H. in that regard. Since that time I have endeavored to get those terms.

[fol. 586] LEWIS C. DEVER was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am general agent for the Canada Atlantic Transit Lines, a differential rail-lake line operating from New York to Chicago, Milwaukee and points beyond. Its affiliated companies are the Central Vermont Railroad and the Canadian National Railway. The Canada Atlantic Transit Lines is merely the name of a route that operates over those 2 roads.

The route is as follows: From New York at Pier 29 East River to New London, Connecticut, by steamer. At New London, Connecticut, freight is loaded into cars traveling through Depot Harbor, Ontario, over the lines of the Central Vermont Railroad and Canadian National Railway and thence from Depot Harbor by the Canada Atlantic Transit Company to Milwaukee, Chicago and other points. Over this route it takes a carload of goods about 8½ days to go from New York to Chicago and 7 days from New York to Milwaukee.

Five years ago approximately 50% of the total commodities handled by us was sugar. Our sugar tonnage from 1926 to 1931 was as follows:

1926	19,774	tons
1927	19,112	"
[fol. 587] 1928	11,489	tons
1929	11,938	"
1930	12,067	"
1931	6,582	"

I do not know under what terms sugar shipped over the C. A. T. Line is sold except that there is no guaranty against price declines on sugar shipped over our line. I do not know whether sugar shipped by rail from New York to Chicago is shipped under guaranty against price decline. In the course of our solicitation I was told by the refiners that our line was not one of the guaranty lines. In 1928 all rail routes were on a guaranty basis. To my knowledge our line was never placed on one.

In the summer of 1926 I complained to Spreckels, National, Arbuckle and American that our line was not on a guaranty basis. I spoke to Kirschbaum, traffic manager of Spreckels, and the substance of the conversation was that the C. A. T. Line was not one of the so-called guaranty lines. We did, however, receive some freight business.

In my endeavor to have the C. A. T. Line placed on a guaranty basis I was referred by Kirschbaum to the Institute. I spoke to him again in the latter part of August, 1929, [fol. 588] when J. O. Adams, general eastern freight agent of our line was with me. In that conversation Kirschbaum suggested that our traffic department in Montreal write a letter to the Institute protesting against the line's not being one of the guaranty routes and to send copies to the various refiners. On receipt of this copy he agreed to take it up with Spreckels' executive.

I also spoke with P. M. Ripley, traffic manager of American. Adams was with me. When we gave him the average time in transit he said he was impressed and asked that we write a letter giving the actual time in transit for July, 1929. I told him it was actually 8 or 9 days and later found that from New York the average time for the month of July, 1929, for all carload freight was 7.88 days per car to Milwaukee and 8.25 days to Chicago. At the time of our conversation Ripley stated that upon receipt of the letter he would take it up with his executive or with the Institute and it would be handled on its merits. Adams then wrote the letter to Ripley.

I also spoke to J. L. Carling, traffic manager of Arbuckle. He stated that Arbuckle was not selling on a guaranty basis and suggested that we interview Judge Ballou, secretary of [fol. 589] the Institute, in order to accomplish our purpose.

I wrote Judge Ballou and received a reply from him.

Petitioner's Exhibits 132 and 133 were received in evidence.

Wiesner is general agent in Milwaukee of the Canada Atlantic Company and is associated with me in our company.

Petitioner's Exhibits 134 and 135 were received in evidence.

Our rate from New York to Milwaukee was 47½¢ compared with the all-rail rate of 56½¢. We received no reply from Pennsylvania.

Petitioner's Exhibits 136 and 137 were received in evidence.

From 1927 to 1928 our tonnage dropped from 19,000 tons to 11,000 tons.

Cross-examination.

By Mr. Browning:

I am quite sure Ripley said he would take the matter up with the Institute. I do not recall that he indicated in what manner it would reach the Institute.

[fol. 590] I do not know that from July 17, 1930, and during the navigation season of 1931 that shipments over the C. A. T. Line were guaranteed against price declines and I made no inquiry to learn if they were. I would be surprised to learn that during the years 1930 and 1931 the shipments were guaranteed.

[fol. 591] Joseph Orville Adams was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am general eastern freight agent of the Canada Atlantic Transit Lines. In 1929 I accompanied Dever when he

talked with Ripley, American's traffic manager. Ripley seemed surprised that our service was as good as alleged and asked me if I would produce some evidence of it to substantiate it and I prepared a statement to show what was done in the previous month on carload business. There was something said about the guaranty against decline on rail shipments but I do not recall the particular conversation. There was a discussion about the absence of guaranties over our line.

Our conversation in substance was that there were certain reasons for this situation but I do not recall whether we went into details. We did go into the matter of our time in transit. He was surprised we were doing so well.

Ripley did not suggest any remedy for the lack of guaranty on our line. He said that when he got this statement and looked it over he would take it up with the Institute.

I was with Dever when we talked with Carling, traffic [fol. 592] manager of Arbuckle. Carling said that although his firm was a member of the Institute he was not interested in guaranteed prices. He recommended that we put the matter squarely before Judge Ballou in person.

I spoke with Kirschbaum, traffic manager of Federal, who expressed sympathy for us in the situation and suggested that we have our traffic manager in Montreal write to the Institute.

Petitioner's Exhibits 138 and 139 were received in evidence.

[fol. 593] CLINTON GOODLOE EDGAR was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

W. H. Edgar & Son is a partnership which my grandfather, W. H. Edgar, started in 1860. In 1870 my father was taken into the partnership which continued until my grandfather's death in 1891 when it became a partnership of my grandmother, who inherited my grandfather's interest, and my father. It continued that way until January 1899 when Mrs. W. H. Edgar passed away and I was ad-

mitted to the partnership under the same name, which has never been changed. On the death of my father in 1906 my mother succeeded to his interest and the partnership has been undisturbed ever since.

From 1860 to 1928 Edgar & Son were merchants, distributors of sugar. In 1928 the volume of business was $21,000,000 and constituted 2% of the sugar distributed in the United States. Prior to 1928 Edgar & Son operated sugar mills located in our warehouses.

We were engaged in the storage business through Edgar Sugar House, a corporation formed in 1906. From 1906 to 1928 the company operated warehouses located at strategic points in Detroit and one each in the cities of Auburn [fol. 594] and Goodland, Indiana, Toledo, Ohio, Iron Mountain, Michigan, Cleveland, Ohio, and Buffalo, New York. The company did a public warehouse business in merchandise of all nature connected with the grocery line. In addition to sugar we stored probably 100 to 150 different kinds of commodities. Of the merchandise stored, 45% was sugar. The warehouse at Auburn, Goodland, Iron Mountain and Buffalo stored sugar exclusively but the remaining warehouses had other accounts.

It became necessary under the laws of some states to incorporate separate warehouse companies which we did under the names of Edgar Ohio Company in Toledo, Edgar Illinois Company and Edgar Iowa Company. They were incorporated for small amounts and the operations guaranteed by the parent company, Edgar Sugar House, which had a capitalization of $1,500,000. There has been no appraisal of its properties, all of which have been owned in the clear since 1921. At that date the assets were $1,250,000.

Prior to 1928 Edgar Sugar House was engaged in the sugar brokerage business. Its charter permitted it do a brokerage business on all grocery commodities. The principal sources of its brokerage were purchases by Edgar & Son and the Isbell Wholesale Stores, which we operated. [fol. 595] It did some brokerage business directly with the refiners, particularly Arbuckle. It also has sold other grocery commodities from time to time on a brokerage basis.

Isbell Stores was an outgrowth of the navy bean business which George Gordon Warren purchased from the S. M. Isbell Company at Jackson in 1910.

When I returned after the war I found that sugar prices were pretty generally demoralized and that sugars were being sold by distributors of fruit and other vegetables on a cash and carry basis at a price at which we could not compete.

I decided to open stores for the sale of sugar and beans on the cash and carry plan. The business started with 2 stores in Detroit and by 1928 we were operating 57 stores in Michigan, Indiana, Ohio, New York, West Virginia and Pennsylvania. The stockholders of Isbell, which operated under a separate and entirely different charter, were a small group of employees and myself.

Isbell usually bought its sugars from Edgar & Son. On rare occasions they made purchase from the refiners. The sugars were put in these stores and every day a collector visited them, counted the stock and collected the money. [fol. 596] The profits, though not large, averaged $15,000 a year.

In 1928 Isbell sold 400,000 bags of sugar. The brokerage of 5¢ per 100 pounds was collected by warehouse company, Edgar Sugar House.

For the year 1927 our varied interests sold 956,689 barrels, or 3,348,412 bags, of sugar. In the same year Isbell sold 109,775 barrels.

Edgar & Son sold direct to small retailers and small manufacturers 177,444 barrels and distributed to jobbers 672,470 barrels. About 75% of the sugar sold was cane and 25% beet. The value of the sugar handled amounted to $21,249,570.80. Isbell employed 70 persons and Edgar & Son 150. The employees of Edgar Sugar House fluctuated between 60 and 70. The total number of all employees was 290.

The Isbell Stores are now closed and Edgar Sugar House employs 50 people and Edgar & Son 70.

The operations of Edgar & Son are distinct from the Sugar House. They keep their books and records separate, and have separate payrolls and different employees. The storage company has an office in a small office building which is next to that of Edgar & Son but not connected with it. Isbell's main office was in the basement of the office occupied by Edgar & Son.

[fol. 597] From 1912 I have been president of Continental Sugar Company, a beet sugar manufacturing company, which is now in receivership. The stockholders are Amer-

ican Sugar Refining, Havemeyer and the public. Each owns about ⅓ of the stock. The receivers are T. G. Gallagher and the Detroit Trust Company. I am and have been a director of the Detroit Trust Company for 7 years.

Until 2 years ago Edgar & Son was the exclusive agent for Columbia Sugar Company, a beet sugar company, which operates at Bay City, Michigan, and Mt. Pleasant and Paulding, Ohio. We sold their sugar, guaranteed their accounts, collected their money, billed their sugars and almost every year Edgar Sugar House rented their warehouse and stored their sugars so they could get warehouse receipts and borrow money from the banks. Our compensation of 9½¢ per 100 pounds was in payment for all of the activities just stated.

Our arrangement with Continental was similar to that with Columbia and we received the same compensation for services. The receivers of Continental, after several years of very unsatisfactory operations, decided they would rent their plants. Last year 2 of them were rented to the Great [fol. 598] Lakes Sugar Corporation for a price that included their carrying charges. We became the exclusive sales agent for the Great Lakes Sugar Company. I am a director of this company and own ⅕ of the stock.

Edgar & Son represent as brokers Great Western, Denver, Colorado, in certain territory east of Chicago. Holland-St. Louis Sugar Company is a beet company that has one plant at St. Louis, Missouri, one at Holland, Michigan, and one at Decatur, Indiana. It got into financial difficulties some time ago and Continental endeavored to absorb or buy it. The lawyers found that the debts of the 2 companies were such that they could not be brought together cleanly and clearly and the separate corporations wound up. Continental exchanged its stock for stock of Holland-St. Louis and at the present time owns 80%. I have a few shares of Holland-St. Louis because I am president of both companies and must have qualifying shares. Our arrangements with Holland-St. Louis were the same as those with Continental and Columbia, only those of Holland-St. Louis were made through Continental.

Under our storage arrangement with the 3 beet sugar companies we rented warehouses at their plants.
[fol. 599] We accepted their produce as it came from the mills, stored it and issued warehouse receipts on which they borrowed money at the bank. In addition to the 9½¢ for

storage, we charged 10% over our cost of operating the field warehouses. We stored sugar for them in Detroit free of the 10% operating cost and the storage charge. Our usual charges in Detroit for the storage of sugar were 6¢ a bag the first month and 4¢ thereafter.

Prior to the formation of the Institute, Edgar & Son purchased sugar from the cane refiners at their list price less special rebates that varied in one way or another. In addition there was the usual 2% discount for cash.

We had a special arrangement with American which paid us 5¢ a hundred and brokerage. American usually paid the brokerage to Edgar Sugar House, but if it happened to pay it to Edgar & Son, the payment was transferred because we wanted to keep our merchandising operations separate from our brokerage operations. Formerly a brokerage commission was 4½¢. Today the amount depends on how one operates and where he is.

If we were operating a national brokerage company with [fol. 600] an office in Detroit and another in New York and the Detroit office picked up an order and transmitted it to the New York office which placed it with the refiner, we would be entitled to 6¾¢. If the sale goes through two offices the brokerage is 6¾¢, but if one it is 5¾¢.

Prior to 1928 we had an arrangement with Pennsylvania and McCahan for purchasing at a 10¢ discount from the list price instead of the 9½¢ which we had from American. We had sundry and various arrangements with Godchaux. Prior to our contract with them it was a matter of negotiation. Sometimes a concession was 10¢ a hundred and sometimes more. I do not think I ever paid Godchaux's list price during that period. We always received a concession. We never paid more than the list price. Prior to 1928 the list prices of the refiners were not always the same. I refer particularly to Federal and Arbuckle who occasionally met Federal. Their list price was 5¢ and 10¢ lower than American's and National's.

Prior to 1928 we did not sell all brands of sugar at the same price. We always received the full list price for American's and National's products. Sometimes we could get the full list for other brands. Sometimes they cut their [fol. 601] own price and if we wanted to sell our sugar we had to meet the cut.

Wholesale grocers read the advertisements and wanted

Domino or Jack Frost brands and were willing to pay the list price for them. Whether they would pay the list price for McCahan, Godchaux, Revere or Arbuckle depended on the territory in which they were selling. There are certain parts of the country, particularly in Ohio and West Virginia, where Arbuckle sells more readily than other brands. There are parts of the South where Godchaux sugar sells very easily and in New England Revere would sell at the same price as American.

By the Court:

In West Virginia Arbuckle did not do much advertising because it originally started business in that territory and had a strong trade following there.

The products of all refiners are so marked that the consumer knows whose sugar he is buying. Local pride caused customers in territories near the refinery to purchase from their local refiner. If there was a local inducement the refiners could compete successfully, even with a nationally advertised brand, whereas if there was no inducement, then [fol. 602] one without either local or national advertising could not compete at the same price as against refiners using national advertising.

By Mr. Rice:

At the present time all refiners carry a variety of packaged sugar. I cannot say if they did so before 1928.

American and National make a complete line from crystal domino block sugar for coffee down to dark brown sugar. They even have small quantities of 1, 2 and 5 pounds in boxes and bags. I do not know if the same condition is true of other refiners because we only purchased from them bulk sugar, which comes in 25 and 100-pound bags. We bought assortments from the advertised brands but seldom from the non-advertised ones. Sometimes we purchased the latter's assortment but could not move it and as a result had frozen stocks on our hands.

In 1926 we made a special contract with Godchaux which provided their sugars were to be sold to us at the price of eastern beet but in a few months the differential fell 30 to 40 points under cane instead of the usual 20 points so in the early part of 1927 another contract running through December of that year was made. It guaranteed our price against

[fol. 603] competitive cane and gave us an allowance of 20 points.

Petitioner's Exhibit 140 was received in evidence.

Exhibit 140 refers to the contract which provided we were to buy sugars at the prevailing price of eastern beet. We received the advantage of the differential irrespective of what it was and we also received the barge rate. The sugars were shipped to Cairo, Illinois, and then transferred by rail.

Petitioner's Exhibit 141 was received in evidence.

By the terms of Exhibit 141 we obtained the advantage of a steady flow of sugar at a price guaranty 10 points under the market. I do not recall if we received an allowance for brokerage. We got water shipments with a rail connection at Cairo. As a result our freight rates to points in Illinois and Indiana were more favorable than those from New York. There was no advantage at Detroit because the Mississippi barge and rail just meets the Detroit all-rail rate there.

Petitioner's Exhibit 142 was received in evidence.

[fol. 604] By the terms of our contract with Godchaux, Exhibit 142, we received a 10¢ concession and a 10¢ brokerage fee.

Petitioner's Exhibit 143 was received in evidence.

We received from Godchaux order bills of lading which were sent to us as quickly as the sugars were shipped and while they were on the river we advanced funds through the Federal Reserve Bank of Detroit. We had agreed to loan up to 80% but Godchaux wanted 90% and we agreed to the request.

Petitioner's Exhibit 144 was received in evidence.

The subsequent contract in which we agreed to loan $250,000 was to continue until December 1, 1927. It was renewed at that time and ran for two years.

This contract provided for operations in the territory in which C. & H. was doing business. The territory was bound by the Mississippi River, State of Illinois and

Chicago, and the Great Lakes and the northern peninsula of Michigan. I do not recall how the question of operating [fol. 605] in this territory was raised. We shipped sugar into C. & H. territory. I do not know if its price was the same as that of National and American.

The letter of March 7, 1927, from Moog, senior vice-president of Godchaux, to Beebe relates to an effort made to call a shipment of sugar shipped to us on a 5.59 basis. I do not know C. & H.'s price during March, 1927.

Petitioner's Exhibits 145 to 151, inclusive, were received in evidence.

A contract was made on the basis suggested in Exhibit 151. The terms of this contract provided for shipping 10,000 bags per week from December 1 to April 8, 1928, 13,000 to 15,000 bags a week from May 1 to August 15, 1928, and 10,000 bags from August 16 to November 30, 1928, continuing through in the same proportion in the years 1928 and 1929. The sugar was to be shipped by barge on order bill of lading and a credit advance of not more than $250,000 with interest at 6% was made available by us for Godchaux on the sugars immediately after shipment. The price was fixed at the lowest selling basis of American, National and Godchaux in eastern territory and the same with the addi- [fol. 606] tion of C. & H. in C. & H. territory less 20¢ per 100, 10 days from the date of the transfer of the sugar from the cars at either Cairo or St. Louis. By the terms of this contract we received a 20¢ concession.

I had some conversations with Godchaux in December, 1927. He told me that the contract was the cause of great difficulty in the formation of some refiners' association. He said we had a perfectly enforcible contract and he proposed to live up to it. I learned very little about the refiners' association until the Institute was formed and the Code of Ethics issued.

Prior to the formation of the Institute we made a special contract with Revere. The terms of it continued for a year. It was a verbal contract but confirmed in the exchange of letters between Revere's office and ours. I made the contract with Worcester in Daub & Carr's office on Wall Street sometime in December. The negotiations were completed between Pitman and Beebe.

Petitioner's Exhibits 152 and 153 were received in evidence.

[fol. 607] The term "shipping instructions and specifications to be given not later than Wednesday of each week for shipments of that week" means just what it says. The price was fixed on the day shipping instructions were given. There was no guaranty feature connected with this contract which provided that during the first 3 days of each week we had to give specifications for 2 or 3 cars which were shipped the latter part of the week. After giving specifications, shipments proceeded within a day or two. The 30,000-bag bargeload is in addition to the 5,000 bags per week. Revere accepted the proposition as we made it up and 2 contracts were signed, one covering the weekly shipments for the period from May 1 to May 30 and the other for the 90,000 bags that were shipped that summer.

We received 30,000 bags a month in May, June and July under the contract which provided for the delivery of 90,000 bags in 3 months. We did not receive the barge rate because they were never shipped by barge. On the face of the contract we received a 10¢ concession. Of this amount 5¢ was a special allowance and the other 5¢ I treated as brokerage. The sugars were distributed in Michigan, Indiana and possibly Buffalo.

We thought we could send a barge to Boston to get the [fol. 608] shipments but found the insurance rates too high and that Revere was not equipped to load the barge when we got it there.

I talked with Worcester toward the end of 1927 and he made a statement similar to that of Godchaux, that these contracts were difficulties in the way of forming a sugar association. Nothing was said to me by any officer of Revere of the necessity of closing this contract in a hurry. I do not recall any other conversation with Worcester. I had no conversation with Pitman at this time.

I had a conversation with Rudolph Spreckels in the fall of 1927 in which he painted a beautiful picture of how the sugar industry was going to be all worked out, how there was going to be a place in it for everybody and how everyone was going to be on a profitable basis. When I asked him how it was to be done he did not tell me anything but he made enough of an impression on me to sign up Godchaux for 2 years and Revere for 1 year.

The first notice I had of the formation of the Institute was in September, 1927, when I heard the refiners were trying to get together to form some kind of an association. After I returned from New York I wrote a letter to Godchaux telling him that I had heard rumors in New [fol. 609] York.

On January 7, 1928, we had notice that concessions were withdrawn by American, Pennsylvania, McCahan and others.

I came to New York and called on my friend Judge Ballou February 8, 1928. In that conversation two questions were brought up, one in regard to our activities and the other to the paying of the brokerage on purchases we made for Edgar & Son and Isbell. He asked me to write a letter to him outlining the activities of the Edgar interests, activities which he called a "horizontal trust." He said it was a grave question whether we could collect brokerage on the purchases of sugar by Edgar & Son. He referred to the Godchaux and Revere contracts and told me that both of them were going to be great difficulties in the way of operating the Institute and that he was disturbed about them.

I had another conversation with Judge Ballou with reference to making additional charges on withdrawals from cities which were no longer consignment points. We had a large supply of sugar which we kept at 37 different points over the country. After the refiners reduced the consign- [fol. 610] ment points and restricted them in the states east of Illinois in the Central Freight Association territory there were complaints about our stocks. Finally the Judge asked if I would not add a further charge for delivery of these sugars and I told him that to comply with his desires I would do so. I placed an additional charge of 10¢ a hundred on withdrawals from consignment points where the refiners did not have consigned stocks. This was continued until it was found that the charge was too high and then we reduced it to 5¢ a hundred. Finally the stocks were sold out.

In 1928, before sailing for Europe, I talked with Judge Ballou in his New York office about a series of complaints that had been filed against us with the Institute for engaging in various and sundry price cutting, freight rate cutting and other things. I was not and am not a member of the Institute. I requested a written statement outlining the charges. I also asked the Judge to tell me the source of the complaints.

He said that was not the policy of the Institute and that he would let me know from time to time about the charges. Then he said "You are going to Europe and I know you are [fol. 611] not well. I know Mr. Beebe is going to run your affairs while you are away and I want you to make me a promise that you will maintain the refined prices and terms, at least while you are in Europe." I agreed to do so during the period I was away and agreeable to his request I instructed Beebe accordingly.

There was no distinction made between the sugars we were receiving under the Godchaux contract and the sugars we were selling as brokers under the Code of Ethics. At the time we were selling Godchaux' sugar we were not, as merchants, buying any other sugar. As far as I know our company maintained refined prices while I was abroad. I instructed Beebe to maintain them on sugar which we were handling on our own account.

Petitioner's Exhibits 154 to 159, inclusive, were received in evidence.

I cannot tell to whom Exhibit 159 was written. It was an enclosure that was sent to Beebe from Judge Ballou. The handwriting on the top and margins is the Judge's.

Petitioner's Exhibits 160 and 161 were received in evidence.

[fol. 612] Mr. Higgins: We do not deny that, as stated by paragraph 3 of Exhibit 161, Godchaux sold on special contracts prior to the formation of the Institute but cancelled those contracts when the Institute come into being. We admit that this shows price competition before formation of the Institute.

On February 8 I talked to Judge Ballou who told me to make a written statement of our so-called "horizontal trust." Exhibit 162 is a copy of a letter that I sent to Judge Ballou.

Petitioner's Exhibits 162 and 163 were received in evidence.

I offered to sell the Godchaux and Revere contracts to Judge Ballou because he told me that these 2 contracts, particularly Godchaux', were causing him a great deal of trouble. I offered to sell him the Godchaux contract for

$240,000, the face value of the 20¢ allowance. The Revere contract was offered on the same basis. We eventually distributed, though not promptly, all of the sugars sent us under the 2 contracts.

We were able to buy as well assorted grades from Revere as from other refiners. Distributors were able to pass out the sugars fairly promptly but before the end of the Godchaux contract their sugars began to back up on us at the rate of $40,000 to $50,000 a week and we reached the point where we had to cut the price in order to sell the sugars. We cut as little as possible, in some cases 5 points and in [fol. 613] other cases 10 points. Godchaux' sugar came in 100-pound bags.

We adopted a new procedure in handling Godchaux' sugars. If a buyer had a contract to purchase sugar from an eastern refiner and did not want to take delivery, we would take over his contract and at some later time deliver Godchaux sugar to him at his contract price. In those cases we did not cut prices, but exchanged sugar for sugar.

We benefited by securing American's sugar for sale and the buyer profited by not having to take sugar for immediate delivery.

Other times we cut prices and in some way or another gave him an advantage he would not have had if he had kept his contract.

Petitioner's Exhibit 164 was received in evidence.

Exhibits 49 to 55, inclusive, are a group of identical telegrams, except as to Revere, which were received by us on May 2, 1929. Upon their receipt I delivered them to my attorney. I did not answer them right away and on the night of the 2d I sent Beebe to New York to see what this [fol. 614] thing was about and how it was going to work. On May 4 I received the series of telegrams contained in Exhibit 56. Up to that time Edgar & Son were operating as merchants, buying and selling sugar.

After receiving the telegrams on May 4 I tried to get in touch with Beebe on the long distance telephone. I called Foster, Judge Ballou, Cody and Stone. Foster, president of American, said I would have to decide what I was going to do and would have to answer the telegrams. I told him the telegrams were in my attorney's office and I would not

answer until I received advice. I then had a similar telephone conversation with Judge Ballou.

I was undecided as to what to do and embarrassed at the delay as the telegrams said I could not do business until I did decide. Judge Ballou said I would have to hurry and make a decision. I had a similar conversation with Cody of Arbuckle and Stone. I received a call from Godchaux and I repeated the same conversation. He said "You will have to hurry up because we can't do business with you until you decide."

On May 6 Beebe returned from the East and brought with him an arrangement suggested by Stone, vice-president of Spreckels. He had also been to Philadelphia and conferred [fol. 615] with Hoodless. The decision as to what we were going to do was being pressed and I was in turn pressing Butzell, my attorney, to tell me the answer.

Finally on May 7 I received from him a draft of the telegram which I sent to the refiners. Exhibit 58 is a group of telegrams which were sent by Edgar & Son to Foster, Stone, Revere, Arbuckle, National, Federal, Pennsylvania, McCahan and Godchaux. On May 7 Edgar & Son elected to do a brokerage business. The warehouse company, Edgar Sugar House, announced by telegram that they were that day turning over the brokerage business they had been doing to Edgar & Son and that they continued and expected to continue to do a public storage business and whether the refiners stored with them or not was at their option. Prior to May 7 Edgar & Son were purely merchants. On May 7 they were purely brokers. Before May 7 Edgar Sugar House were brokers and warehousemen and after May 7 they were warehousemen. They did not directly store sugar for the account of refiners after May 7.

On June 14 a committee of the Institute, composed of Weston, sales manager of Pennsylvania, Cody, sales manager of Arbuckle, White, sales manager of American, and Bruyn, in charge of the sales department of National, vis- [fol. 616] ited me in Detroit. After going over the warehouse situation we pointed out to them that our warehouses were better located than others for the storage of sugar, because they were supplying groceries and canned goods to wholesalers. We also pointed out it would be a handicap to the wholesale grocer not to be able to buy his sugars at

the same warehouse where he bought the general food products. The committee finally came to the conclusion that it might be possible to have a warehouse rent space in our warehouse and operate it for storing their sugars. They proposed that we rent to an outside warehouse, a space in this building. I suggested to them Detroit Harbor Termi- House and Detroit Harbor Terminals the sugar of the refiners was to be stored by the Detroit Harbor Terminals and have not directed or suggested the manner in which it should handle its business.

Detroit Harbor Terminals had 2 advantages; the first was that of being on the river where it could handle boat and other shipments for the refiners and the second was that it was so far out of town that it would not compete and none of our other accounts would be drawn to its warehouse.

I did not know Harold Brown prior to this time and do not recall having met him before May, 1931.

[fol. 617] By the arrangement between Edgar Sugar House and Detroit Harbor Terminals the sugar of the refiners was to be stored by the Detroit Harbor Terminals either in its own warehouse or in the space which we rented to it in our warehouse No. 1 on the west side, No. 2 on the east side and No. 4 on the north end. The price was our regular tariff price and 5¢ per square foot for the space they wanted to occupy plus 4¢ per bag for handling the sugars in and out. The warehouse fee of Detroit Harbor Terminals was 4¢ a bag for storage and 2¢ for handling.

Sugar bags cover approximately 2½ square feet and can be stored to great height if there is ceiling room. The maximum height to which we can store sugar is 10 bags. At 5¢ per square foot the return on 10 bags is 12½¢ and together with a handling charge of 4¢ per bag in and out made a gross return of 52½¢. The refiners paid Detroit Harbor Terminals 60¢ for this service, allowing the latter the gross profit of 7½¢ per 10 bags of sugar.

The committee came to my office with this plan and the prices were submitted to them. They were then taken down to the Detroit Harbor Terminals by Beebe.

[fol. 618] We sublet part of the space of the Edgar Sugar House to Detroit Harbor Terminals under a flexible arrangement as to the amount of space used. It was marked out on the floor and by cards put on the bags or boxes of sugar showing that the sugar was in a certain space leased

by Detroit Harbor Terminals. The committee said if this arrangement was made they wanted me to stop storing sugar of every kind, including beet, in our warehouse. I pointed out to them that I had a contract with some of the beet sugar factories and could not agree to such an arrangement.

This would have had a very grave effect upon our beet sugar business because the storage of beet sugar is tied to its financing, which we arranged through warehouse receipts, using some of our funds and arranging for some of the companies to borrow from the banks. Under ordinary competitive conditions a sugar merchant must have warehouse facilities in or near his place of business. The advantage of his own warehouse is the income from storage.

It is customary for the wholesale grocer and jobber to control or own the warehouse where he stores his merchandise and to carry a stock of sugar and all sorts of commodities that he sells. In many cases jobbers have had warehouses or they have called their own building a ware- [fol. 619] house for the purpose of collecting storage from anybody who was willing to pay. This method is usually concealed from competitors. It cannot be concealed from the manufacturer because he pays the storage.

Prior to 1928 the merchandising profits of Edgar & Son totalled between $100,000 and $150,000 a year and we lost all of that. We had to shut down our powdered mills which were standing in the warehouse and the equipment became obsolete. We stored cartons, packages and supplies that were ready for the use of the trade because we put out a 2-pound package of powdered sugar under our own brand "Household." The powdered mills, equipment, cartons and supplies that are standing in the warehouse show a loss of $12,350. We were also asked in a letter from Taylor of the Institute to dispose of the powdered mill. The Institute also advised us in a letter that we could not rent it to Lee & Cady.

Before the forced election Edgar Sugar House operated 20 trucks in Detroit and an additional 6 in 4 other cities. Now we operate 3 to 5 trucks in Detroit. Sometimes we get a little business and go up to 6 or 7 and then we go back again. The loss through obsolescence of this equip- [fol. 620] ment is $5,000. We lost $15,000 a year profit which we were making on Isbell Stores and $20,000 brokerage on their business. The annual profit of $20,000 to

$25,000 from the powdered sugar mills, which had an output of 1½ carloads per day, was lost, as were storage earnings.

Petitioner's Exhibit 165 was received in evidence.

Prior to the receipt of Exhibit 165 I told Judge Ballou I would close the powdered mills. I had been asked to give him such an assurance and eventually the mill was closed.

Petitioner's Exhibit 166 was received in evidence.

After electing to become a broker, my first step was to stop the sale of sugar to the retail trade, which meant the laying off of 10 or 15 salesmen, some of whom had been with us as long as 25 years. They sold to small retailers and manufacturers who used less than carload quantities. We had stocks throughout the country from which these deliveries were made and we attempted to dispose of them and stop sales. The second step was the closing of the [fol. 621] Isbell Stores completely. Judge Ballou had told me from time to time they were a constant source of irritation to the Institute and when this order went forth I knew they had to be closed. Some refiners had reached the point where they did not want us to distribute their sugars to these stores because of the irritation. Cody of Arbuckle made such a request and I acceded to it. We closed all 57 of the Isbell Stores, dismissed the employees and collectors and stopped operations. We did it as quickly as we could in order to minimize the losses. I was asked by the officials of the Institute to do it more quickly.

It was unreasonable to ask us to cease merchandising activities upon the expiration of the Godchaux contract because the sugars were at least 3 weeks in transit before they reached destination and in addition we had accumulated 100,000 bags of their sugars.

Petitioner's Exhibits 167 and 168 were received in evidence.

Lee & Cady are wholesale grocers whose warehouse and powdered mills are near us. I tried to arrange with them for the renting and operation of our powdered mills so they [fol. 622] could fill our orders but the Institute would not permit it. The powdered mills are closed and standing empty today and have been since this correspondence. We are not permitted to rent or operate them.

Petitioner's Exhibits 169 to 171, inclusive, were received in evidence.

Except in 1 or 2 instances I obtained pledges under oath from my sub-brokers.

Petitioner's Exhibits 172 to 174, inclusive, were received in evidence.

These letters seem to indicate a desire on the part of the Institute to keep our name and invoices from getting through to the trade.

We complied with the request and disposed of the merchandising business. We turned over our salesmen and customers to Lee & Cady in an effort to get this end of the business closed up but there seemed to be a continuous complaint from other brokers and distributors in our market that we were doing a merchandising business because our invoices were going to the trade. We at the time and since, [fol. 623] have had contracts for the collection of money on the sales of sugars for Continental and Holland-St. Louis. We stamped the invoices for their account and also for the account of certain customers for whom we were selling sugars secondhand.

Petitioner's Exhibits 175 and 176 were received in evidence.

Exhibit 177 is a memorandum which was handed to me by Stubbs of American in his office in June 1930. He said "Here is a list of complaints which the Institute has against you which I desire to have you answer."

Petitioner's Exhibit 177 was received in evidence.

I turned the matter over to Beebe who was present and told him to investigate and give a written report to Stubbs on the exact situation. Exhibit 178 was his written reply to the findings.

Petitioner's Exhibit 178 was received in evidence.

On June 28 we were distributing beet sugar for the receivers of Continental and Holland-St. Louis. We were [fol. 624] their exclusive distributors in 1930. The Institute complained of our invoicing Continental in the name of Edgar & Son.

Petitioner's Exhibits 179 and 180 were received in evidence.

The Institute committee which came to Detroit asked as a return for the arrangement it made with Detroit Harbor Terminals that I not store any sugar in our warehouse but I did not accede to their request. They referred to beet sugar which we had under contract because at the time of their visit we were handling beet sugars of Continental, Holland-St. Louis and Columbia, none of whom were members of the Domestic Sugar Bureau or the Institute.

I was asked orally by Judge Ballou late in 1928 in the Institute office to join the Domestic Sugar Bureau. He said it would greatly please the sugar refiners if I joined and put myself under the beet sugar code of ethics, which was similar to the Institute Code. The Domestic Sugar Bureau is the sugar association of certain cane refiners in Louisiana and beet manufacturers. Its offices are in Chicago. James Orson Douglas is its secretary. The Bureau sent its code to me but I never read it. When we organized the Great Lakes Operating Company it was promptly in-
[fol. 625] vited in writing to join the Domestic Sugar Bureau.

Petitioner's Exhibits 181 to 184, inclusive, were received in evidence.

Daub & Carr and Minford Lueder are sugar brokers in New York. Exhibit 184 deals with the brokerage on sales of sugar which Edgar & Son merchandise. I arranged with Foster, until the Institute decided whether I could collect a brokerage or not, that American should hold it. When they decided that I could not have the brokerage, Foster allowed me to nominate to whom it should be paid and I selected Daub & Carr and Minford Lueder. This arrangement was made in 1928. I was advised by letter that I could not collect brokerage on W. H. Edgar and Isbell Stores business. I received a copy of the Code but do not remember what it said on this subject.

Petitioner's Exhibit 185 was received in evidence.

The "bona fide commitments" mentioned in Exhibit 185 referred to the Godchaux contract which had some months to run.

After May 7 I solicited the refiners' business for Edgar

[fol. 626] Sugar House and offered to receive storage of their sugar. The only sugars which we received after that date were those in transit.

Petitioner's Exhibits 186 and 187 were received in evidence.

The committee of the Institute approved the following branches of Edgar Sugar House warehouses:

No. 1 at Twelfth and Lafayette;
No. 2 at DeQuinder and Grand Trunk Railroad;
No. 4 at Clay Avenue.

The question of No. 5 warehouse was taken up with the committee at the time they were in Detroit and it was our understanding that if it was needed it could be used. It served a certain district in a certain section of Detroit 2 miles from our main warehouse.

Petitioner's Exhibits 188 to 199, inclusive, were received in evidence.

I was investigated in July, 1930, by Chinal, an Institute representative, who came to our Indianapolis office and [fol. 627] asked for access to all of our records and letters.

Petitioner's Exhibit 200 was received in evidence.

I had a conversation with Moog in his office prior to the time Exhibit 200 was written. I handed him a copy of affidavits and a bill of complaint that was prepared at my direction by our attorney at Indianapolis. I told him I was going to sue the Institute for slander. At the time Moog was chairman of the Enforcement Committee of the Institute.

Petitioner's Exhibit 201 was received in evidence.

Patterson came to our office in Detroit in December and said we were charged with breaking our broker's oath. I told him I wanted the exact charges put in writing. We had signed a broker's oath against the advice of my attorney because we either had to sign or go out of business.

Petitioner's Exhibits 202 and 203 were received in evidence.

[fol. 628] After receiving Exhibit 203 I wrote to Taylor.

Petitioner's Exhibit 204 was received in evidence.

I told Patterson that we would go through our files and take out any papers he wanted but that was not satisfactory to him. He wanted access to all our records and files to take out what he pleased, but I refused.

Petitioner's Exhibits 205 to 209, inclusive, were received in evidence.

We had a telephone call from Stone of Spreckels telling us to give no information to Patterson regarding any transactions we had handled for his company.

After receiving Exhibits 205 to 209, inclusive, I left them with my attorney. After receiving his opinion I sent a telegram, Exhibit 210.

Petitioner's Exhibits 210 to 214, inclusive, were received in evidence.

Patterson called for certain papers and was accompanied to our files by Beebe. The investigation lasted only [fol. 629] 15 or 20 minutes because they clashed as to what rights they had. I had no conversation with Patterson at the time and he left without calling on me. He then moved into the Detroit Harbor Terminals office.

Petitioner's Exhibits 215 to 220, inclusive, were received in evidence.

Prior to October 6, 1930, we made arrangements for our customers to have sugar hauled direct from the refiners' consignment in warehouses to their stores or their customers, thus effecting a saving in the cost of taking the sugars to their own warehouse, unloading them, marking them and reloading them into their trucks. We arranged with cartage companies to cart these sugars and at the end of each week we billed the customer for the cartage. We performed such service for the A. & P. in Chicago, Indianapolis, Detroit and Cincinnati. A. & P. probably saved between 10¢ and 15¢ a bag by this arrangement. Prior to this time A. & P.'s practice was to ship sugar direct to its own warehouse where it was unloaded, piled up, pulled down again, marked and put on its trucks and delivered to the stores at their expense. The service does not cost the refiner any-[fol. 630] thing. Something happened because there [was a great deal of complaint from] the Institute about this

and finally we were requested by the Institute to stop giving this service.

Petitioner's Exhibits 221 and 222 were received in evidence.

Early in 1928 the elimination of the consignment points was discussed in the trade and I discussed the matter with Judge Ballou. The one point that I can remember very distinctly was a consignment at Grand Rapids about which we had correspondence. He said Grand Rapids was eliminated as a consignment point and there would not be any more shipments there by refiners. We had a stock of sugars in Grand Rapids.

Petitioner's Exhibits 223 to 231, inclusive, were received in evidence.

In 1926 we first started using motor barges and dealt with a barge line known as the I. L. I., or Inter-Lake, Inc., now known as Erie & St. Lawrence Barge Line. In 1926 we made a verbal agreement with them whereby we took over their westbound tonnage from New York to Detroit. The rates were variable and in return we offered to help [fol. 631] them get automobile parts and other commodities for eastbound passage. The 5 barges of the line have a capacity of 30,000 bags of sugar each and have a "turn around" about every 20 days. The shipping season lasts from about April to November. We filled these barges to capacity in the years 1926, 1927 and 1928.

In 1928 the Trans Marine Corporation also handled sugar for us. The sugars were bought f. o. b. New York but were not all bought by us. Some were handled for refiners. The lake-canal rate was 34¢. Our rate depended on the time consumed in making a round trip. If the time was short, the rate to Detroit was around 25¢.

We continued shipping sugars by barge until the first trips of 1929. We had boats all loaded up and made one trip with the I. L. I. and Trans Marine barges—when the axe fell.

After the receipt of Exhibits 35 to 48, inclusive, announcing delivered prices, we were unable to ship by barge.

Petitioner's Exhibit 232 was received in evidence.

Under our charter with I. L. I. for the 1929 season we [fol. 632] were to furnish the westbound tonnage. I was

not requested to give up that charter and was left with it on my hands. After the announcement of April 30, 1929, we were unable to purchase f. o. b. refinery. I had conversations with officials of the I. L. I. line and also pointed out to Judge Ballou that I was liable for the westbound tonnage under my charter and that these boats could not go westbound empty and get under the bridges. He said he would take the matter up with Julius Barnes, president of the I. L. I. lines, for the purpose of determining just what our liability was in connection with these boats.

Petitioner's Exhibits 233 and 234 were received in evidence.

In the latter part of February, 1931, I was in New York and discussed with Foster of American telegrams telling us to open our files and let the Institute go over them. He said he had hesitated to send them and that Post had told him he would not send National's telegram until he was assured American had sent theirs.

I had many conversations with Judge Ballou in reference to alleged complaints against Edgar & Son. He cautioned me repeatedly that unless I maintained refiners' prices and [fol. 633] terms it would have a very bad effect, and during the period I had the Godchaux contract he told me that the Institute would break up unless I maintained their prices and terms. He referred to the contract many times.

At about the same time Fred Taylor told me that small brokers and warehouses had been put out of business by the Institute but that no National broker had been operated on yet. He put the emphasis on the "yet" because it was at this time that they were investigating me.

Exhibit 236 was a telegram of April 24, 1929, announcing a flat rate to Detroit of 27¢. On April 30, 1929, my memory is that the refiners applied approximately the rail rate on shipments, no matter how they moved.

Petitioner's Exhibit 235 to 258, inclusive, were received in evidence.

I chartered the barges in 1926, 1927, 1928 and 1929. In the last year the charter was made in January or February. Judge Ballou wrote to me asking what rates we were going to make under this charter. I advised him by telephone that in view of the importance of the matter I would

come to New York and discuss it with him. I came April 22 and the Judge invited me to attend a meeting of the traffic managers of the Institute. He told me that the purpose of the meeting was to try to come to some adjustment on the canal rates. The Judge knew we had this charter but did not know what rates we had and at the meeting ques- [fol. 634] tions arose as to what rates would be at the various points. Ripley of American, Raymond of National and Carling of Arbuckle were there. There was a great discussion over the Buffalo rate and what we were going to charge. I said I thought it would be around 16¢. Some of those present said it was not low enough. After considerable discussion I finally got quite disgusted with the way things were going and said that I thought traffic managers were for the purpose of making money and not for the purpose of throwing it away. I was asked 1 or 2 other rates that could be made under this charter and then the meeting, which was hopeless, broke up.

Petitioner's Exhibits 259 to 263, inclusive, were received in evidence.

Prior to 1921 we enjoyed the privilege of transiting, that is, forwarding sugars out of Detroit and other transit points at the through rate. The transit followed the sugars, not the shipper, and any warehouse or local dealer in the transit point was entitled to use the transit. The purchaser always took with the sugars the transit privilege if he wished.

The Central Weighing and Inspection Bureau prepares the bill of lading and the receipt. A notice comes from the [fol. 635] railroad upon the arrival of a car and is taken to the Transit Bureau where it is registered for 6 months, during which period the owner of the sugar has the privilege of going to the Bureau and having the bill stamped, showing that the same amount of tonnage has been forwarded. In 1927 the buyer had the absolute right to transit the sugars under the original bill of lading at the through rate for the period of 1 year.

Until Boyd's Tariff was adopted the transiting privilege followed the title of the goods shipped. We have handled the transiting of a great many commodities and sugar is

the only one I know of on which the railroads have placed a restriction.

Petitioner's Exhibits 264 to 268, inclusive, were received in evidence.

Prior to the formation of the Institute, when the old tariff was in effect, as a purchaser of sugar, I was never refused the transit privilege where applicable nor to my knowledge was the transit privilege ever refused to a purchaser of sugar.

Prior to 1928 we had the privilege of using the transit billing both on shipments made from the refiner direct to us and on shipments from consignment.

[fol. 636] If 200 bags of sugar were shipped from Boston and 300 from New York and the total was consigned to a warehouse in Detroit, the purchaser had the privilege of shipping them together in one car on either Boston or New York billing. The deciding factor was whether or not the through rate was protected. The Transit Bureau ruled we could use the billing and no question was ever raised as to our privilege prior to 1928.

Since the formation of the Institute there has been a change in the transit privilege. The refiners changed the method of consigning the sugar. Before 1930 it was consigned to the refiner in our care and the Transit Bureau ruled that we had authority under that ruling to use the bills. When the change was made the billing read "American Sugar Refining Company care of the River and Harbor Terminals" and Edgar was out of it.

Petitioner's Exhibit 269 was received in evidence.

Prior to the issuing of Boyd's Tariff the transit had been a local matter and each railroad issued a tariff covering the transiting of sugar. Boyd's Tariff, a master tariff, issues one tariff for all railroads in the Central Freight Associa-

[fol. 637] tion territory in the Trunk Line Association. It put in the hands of the original shipper, at the time shipment was made, the privilege of saying whether the sugar was to be stored in transit or not. In the absence of a notation the purchaser was unable to register the bills and transit.

Note A in Boyd's Tariff gives a list of storage points at which sugar can be stored in and about New York Harbor.

The refiner then had 2 stops in transit. Under that exception the refiner retained the transit privilege whereas the purchaser did not retain the full privileges he had prior to Boyd's Tariff.

The beet sugar factories in Michigan were not at any of these points and could not transit but once with the result that great hardship was imposed on them.

Under Section 70 of the Boyd Tariff the purchaser had to store the sugars in one warehouse. If he wanted to transit out of another warehouse, no matter if it was from the same shipper or to the same point, the bill was not effective. He could not transit.

Prior to Boyd's Tariff we had the privilege of substituting the sugar of one refiner but never beet for cane. By the terms of Section 190 the former privilege was lost.

[fol. 638] Prior to the issuance of Boyd's Tariff Stubbs and Ripley of American asked me not to file a protest against its adoption but I did so. Nevertheless, with the exception of Section 120, it was adopted by the Interstate Commerce Commission.

Petitioner's Exhibits 270 and 271 were received in evidence.

The only change in National's 1931 contract is the buyer's consent clause. It provided that the buyer consents that if any sugar shipped to him direct is diverted, reconsigned or moved to a destination other than the one shown upon the original bill of lading or if the same or other sugar is moved under the carrier's storage and transit privilege with tonnage groups according to the shipment made under this invoice, any carrier, including the Carrier's Inspection Association, is authorized to notify the seller as to the contents of the car, the routing, the destination and the complete delivery record at ultimate destination of any such movements, and the seller is authorized to convey this consent to the carrier or carriers.

Twenty-five other commodities carried by the Wabash Railroad and 29 carried by the Michigan Central have the [fol. 639] transit privilege. The commodities are pears, beet pulp, beans, condensed milk, cotton, etc.

After April, 1930, American on 2 occasions refused to sell 2 barge shipments f. o. b. refinery. Prior to that time we were never refused f. o. b. purchases. I say that with a

reservation because there are times when refiners do not want to ship that way and times when there is congestion of boats at their bulkhead and they cannot.

Resales are the sales of sugar for customers who overbought and sales for speculators. Such sugars are generally known as second-hand sugars. Speculators or operators buy sugar and expect the market to go up. If it does they resell at their own price and terms. On the resales, as broker, we usually collected the brokerage commission. On sales where the purchaser desires to get rid of the sugars or is not able to use them all they are usually sold without a second charge.

Our resales have largely increased since the formation of the Institute. The enforcement of the 30-day delivery clause has had something to do with this as has the decrease in the number of price changes. The price of refined has not varied as much nor followed the price of raws as closely since the Institute.

[fol. 640] I have taken some examples from Willett & Gray to compare the price movement of refined and raw sugar prior to the Institute with that after the Institute. On January 2nd of 1927, the refined market advanced from 6.25 to 6.35, and sugars were contracted for at 6.25 basis, with raws showing closest date prior to this move at 5.21. Quotations on raw sugars for that period were as follows:

January 3rd, 5.21; January 4th, 5.27; January 5th, 5.15; January 7th, 5.12; January 12th, 5.02; January 14th, 4.99; January 18th, 4.96. On January 18th the refined basis was promptly reduced to 6.00 basis.

January 21st, the refined market advanced from 6.20 to 6.25, contracts being taken at 6.20, when raws showed 5.02. Quotations on raw sugars for that period were as follows: January 20th, 5.02; January 24th, 4.90; January 26th, 4.93; January 27th, 5.02; January 28th, 4.90; and on January 29th the refined market was promptly reduced to 6.15 basis.

February 17th, the refined market advanced from 5.95 to 6.05, contracts being taken at the 5.95 basis, with raws at 4.90. Quotations on raw sugars for that period were as follows: February 16th, 4.90; February 23rd, 4.96; February 28th, 4.90, and on March 4th the refined market de-
[fol. 641] clined five cents to basis 6.00. The raw market continued to decline after this date showing as follows:

March 8th, 4.93; March 10th, 4.90; March 14th, 4.83, the refined market being promptly reduced on March 14th to $5.90 basis, although the thirty day contracts had not expired.

June 26th, the refined market advanced from 6.10 to 6.20, contracts being taken at the 6.10 basis, with raws at 4.58. The raw market shows as follows during the ensuing period: June 17th, 4.58; June 29th, 4.52; July 8th, 4.58; July 11th, 4.61; July 12th, 4.58; July 13th, 4.55; July 20th, 4.52. On July 12th the refined market was reduced back to the 6.10 basis, and with the reduction of raws to the 4.52 basis on the 20th, the refined market was reduced to 5.80 basis.

July 25th, the refined market advanced from 5.80 to 5.90, with raws at 4.52. The quotations on raw sugars for this period were as follows: July 25th, 4.52; July 26th, 4.46; July 28th, 4.52; August 1st, 4.46; August 2nd, 4.46. On August 1st the refined market declined to basis 5.60.

Compare this year with 1930:

On April 4th, the refined market advanced from 4.70 to 4.90, with raws quoted at 3.61. Contracts were entered for a thirty day period at the 4.70 basis. The quotations on raw [fol. 642] sugars for that period were as follows: April 1st, 3.61; April 8th, 3.39; April 16th, 3.42; April 24th, 3.39; May 1st, 3.30; May 6th, 3.27; May 9th, 3.24; May 12th, 3.21; May 27th, 3.14; June 4th, 3.24. On May 21st, one month and seventeen days after the entering of the contracts, raws had declined forty points, but the price of refined sugar only reduced back to the original 4.70 basis, and this price was maintained until June 4th, when refined was reduced twenty points to a 4.50 basis.

June 30th, the refined market advanced from 4.60 to 4.70 basis, with raws being quoted at 3.38. The refined market held at the 4.70 basis until August 4th, although raws had declined as follows: June 27th, 3.38; July 2nd, 3.30; July 8th, 3.28; July 10th, 3.30; July 11th, 3.28; July 15th, 3.26; July 16th, 3.25; July 18th, 3.26; July 22nd, 3.28; July 24th, 3.25; July 28th, 3.22; July 29th, 3.19; July 30th, 3.18; July 31st, 3.20; August 7th, 3.25. On August 4th the refined market reduced to 4.60 basis, and two days later, August 6th, reduced to a 4.50 basis.

On November 16th, the refined market advanced from 4.65 to 4.75 basis, with raws quoted at 3.48, and contracts for refined sugar were taken at the 4.65 basis. The market on

refined sugar was held at the 4.75 basis until December 15th, when the refined market was put back to the 4.65 basis, which [fol. 643] was the same basis at which previous contracts had been taken, although raws had reduced to the following quotations: November 14th, 3.48; November 17th, 3.45; November 18th, 3.39; November 19th, 3.34; November 25th, 3.40; December 3rd, 3.34; December 6th, 3.35; December 9th, 3.39; December 10th, 3.37; December 12, 3.34; December 15th, 3.31; December 16th, 3.25; December 23rd, 3.23. On December 22nd the refined market was reduced to a $4.55 basis.

[fol. 644] By resales buyers who have contracts and see the raw market sinking have a chance to unload before the refined price declines.

I have studied the base figures for raw and refined in Willett & Gray. First I counted the number of changes in the refined market and the number of changes in the raw market from 1924 to the beginning of the Institute and afterwards.

In 1924 there were 47 changes in refined and 125 in raw; in 1925 there were 43 changes in refined and 115 in raw; in 1926 there were 42 changes in refined and 85 in raw; in 1927 there were 35 changes in refined and 95 in raw; in 1928 there were 27 changes in refined and 103 in raw; in 1929 there were 19 changes in refined and 92 in raw; in 1930 there were 22 changes in refined and 110 in raw and in 1931 there were 21 changes in refined and 108 in raw.

In 1930 we resold sugar for the First National Stores in Detroit. The company operates in New England and has no stores in Detroit. We sold contracts to First National with New Orleans, Philadelphia and New York refiners. At the [fol. 645] end of the contract periods First National asked us to resell the sugar which had been bought for the purpose of reselling. The quantity sold was considerable.

Since they could not buy from refiners in New England in longer than a 30-day contract, and wanted to buy a large quantity in order to protect themselves in case of an advance in the market, these contracts were made with non-New England refiners and the sugar purchased under them could not be shipped to Boston to compete with Revere. It was purely a speculative venture on their part.

First National received a better price on the resale than the purchase price because the price of refined was higher.

at the end of 30 days. If the price had gone down they would have lost money on the speculation. Our resale business is conducted for those who overbuy or want to speculate in sugar.

In 1930 I signed a broker's pledge under which I agreed not to merchandise sugar. Since signing the pledge I collected a rebate from the Overland Transportation Company, [fol. 646] a trucking concern which trucked for refiners and beet sugar companies. The arrangement provided they were to rebate 1¢ per bag on the sugars hauled from certain beet factories. We actually received a rebate of about $145 on cane sugars but were unaware of the fact until it was found by our auditors in January, 1931. Upon the discovery I called on the officials of the Overland Transportation Company and had an adjustment made on the rebate that was due for the month of January.

Our records show a sale of sugar to Joe Mesch. American drew my attention to this sale of 377 bags of damaged sugar and I wrote a letter to Abbott March 22, 1930. Since that time I have discovered that this damaged sugar was actually bought by my company for 2 months in 1930 and that similar purchases were made from Arbuckle. This transaction was handled in our traffic department and the name was conceived by one of my employees. The practice continued until it was drawn to my attention by American. It was not in accordance with my business ethics and I am heartily ashamed of my organization for doing such a thing. American had an auditor in the office who examined the sugars and fixed the price. We purchased the damaged sugar at that [fol. 647] price through a dummy by the name of Joseph Mesch, who was either a bootlegger or a tailor.

Petitioner's Exhibits 272, 273 and 275 to 297, inclusive, were received in evidence.

Cross-examination.

By Mr. Higgins:

In 1928 the warehouse company offices were managed by Kerrison. They were across the private driveway from Edgar & Son's offices. The buildings were about 15 feet apart and were on the property of Edgar Sugar House. Edgar & Son's offices were located at 1924 Lafayette Boule-

vard and the Isbell Stores occupied a single room down a flight of stairs in the same building.

The bookkeeping for the warehouse was done by a staff separate from that of Edgar & Son's. The bookkeeping of Isbell Stores was a small matter and was handled with that of Edgar & Son's.

I have an accountant, Miss Sullivan, who looks over everything. She keeps my personal books and has the accounting of Edgar & Son, the final putting together of the profit and loss statements and the warehouse books are brought to her for examination. We also have an insurance [fol. 648] company which she looks after. In substance, Miss Sullivan, Beebe and myself are the 3 executives who operate in common the partnership and the 2 corporations.

Each of the Isbell Stores carried a certain amount of sugar and as it was sold out they called on Edgar & Son to replace it. The collections were made from the Isbell Stores, the money brought in and deposited in the Isbell account and as it accumulated it was turned over to Edgar & Son.

I told Judge Ballou about the ownership of my companies, but not their operation. Edgar & Son concealed nothing because the refiners knew exactly what we were doing through their representatives. I cannot understand why the refiners did not know of my stock interest in these different companies.

At the beginning of the Institute I was told that if a man was interested in a buying company he could not collect brokerage. American was holding up a considerable sum of money and Foster said it would be held up until the question was settled. I explained the situation to Judge Ballou and at his suggestion wrote the letter of February 9. It stated that I had a preponderance of interest in these [fol. 649] companies and as a result the Institute said I could not collect brokerage for Isbell Stores and Edgar & Son.

Isbell Stores was the first of my activities that was surrendered at the request of the Institute. I did so in the summer of 1929 because the stores were a great source of irritation to the refiners. By the terms of Arbuckle's contract we could not put their sugar in the stores.

We were selling sugars at very little above cost and making a 2%, and sometimes only a 1%, profit.

The Institute, in forcing us to give up various activities,

caused us to lose brokerage on this particular business. It irritated the refiners and Judge Ballou that we operated these stores the way we did in competition with fruit men and various people who had very small costs, and I decided that the decent thing to do was to stop that first. It was a mistake. In order to maintain our outlet for the sugars we had stored over the country, we should have kept the stores until the last and stopped other activities.

We had managers in charge of the stores though sometimes we may have rented space in someone else's store. [fol. 650] We operated them by putting in a stock of about 100 or 200 bags of sugar plus some bags of beans, hired a manager and sent a collector around each night to count the stock, find out how much sugar had been sold so it could be replaced and deposited the money in the bank.

I do not know it to be a fact that Isbell Stores showed a loss for the years 1926, 1927 and 1928 and I cannot say that the reason that they were first closed in 1929 was because they had been losing money for 3 years prior to that time. The only thing I recall is that the stores were an irritation and it seemed best to close them first. It may be that they lost money for the 3 years but the brokerage on them in 1926 and 1927 was a profit.

The brokerage was collected by Edgar Sugar House on sales made for the refiner to the Isbell Stores and was a profit for the Sugar House, not Isbell Stores. To a certain point we could afford to take a loss on the Isbell Stores operation as long as it enabled us as Edgar Sugar House to collect brokerage on the sales of sugar.

We found that the method of handling the Isbell account was not satisfactory and changed it. The moneys collected from the stores were deposited to the account of Edgar & [fol. 651] Son immediately, instead of making the exchanges from time to time, and at the end of the month if Isbell needed money, we transferred it back again.

The following figures from Isbell Stores profits in 1926, 1927 and 1928 are net figures as they appear in our income tax statement. They include the profits from the sugar less certain allowances and deductions that were made because of certain losses taken in the disposition of elevators which we owned. The figures do not represent the net profits or losses on the sale of sugar but a net profit or loss for income tax purposes. The fiscal year of Isbell started June 30 so the figures are for one-half of one year and one-

half of another. In 1925 and 1926 the profit was $24,285.66; in 1926 and 1927, $14,795.69; from July, 1927, to January 1, 1928, $4,310.45; from January 1 to July 1, 1928, there was a loss of $2,071.32.

I began to close the stores in 1928 instead of 1929. These stores were partially closed before the ultimatum from the refiners in 1929 requiring me to cease merchandising sugar. We were still trying to close stores in 1929. There were 2 or 3 open at the time we made the statement of our position to the Institute but I have forgotten when that was. We first began to close the Isbell Stores in the spring of 1928 because some of the refiners, particularly Arbuckle, did not want their sugars sold in the stores.

[fol. 652] It is true that already in 1928 we had a definite ruling from the Institute that we could not collect brokerage on our purchases for Edgar & Son and Isbell Stores but we did have the right in 1928 to buy sugars if we wanted to and operate as we wanted.

In making the Revere and Godchaux contracts in December, 1927, the thing I had in mind was that I would not be able to obtain any special concession after the Institute's formation. Godchaux was as anxious to sign up the contract as we were.

As far as I remember I did not have any information that the refiners were going to require an election of functions before May, 1929. My testimony that the closing of the Isbell Stores was due to this ultimatum of the refiners in May, 1929, was erroneous. My information now is to the effect that we started closing these stores in 1928 and at the time of the ultimatum only a few of them were still open. They were closed and the losses, testified to as due to the ultimatum of May, 1928, applied only to the stores closed after that date.

I have no recollection that the Isbell Stores lost money and I do not think they did lose money.

According to the figures of the Domestic Sugar Bureau there was produced in the beet sugar campaign in Michigan during 1931 and 1932 1,609,679 bags of beet sugar and 206,464 bags in Ohio, making a total of 1,816,843 bags. We had [fol. 653] a sales contract with the Great Lakes to sell 432,000 bags and with West Bay City to sell 140,000 or a total of 572,000 bags, which is approximately 30% of the output.

Defendants' Exhibit K was received in evidence.

I have never been invited to join the Sugar Brokers' Association even though I was one of the largest brokers in the country and I have often wondered at it. I have discussed the membership in the Brokers' Association with the treasurer but I don't think I asked him to make application for me. I made no attempt to inform myself about the code of ethics of the Brokers' Association against the time when I might possibly be invited to join it. I did not know the Association had a code of ethics which forbade its members to split brokerage with their customers. If I had it would not have influenced my attitude toward joining.

We have split brokerage at times with customers but I have not split brokerage on cane sugars with anyone. That is not our policy and we cannot and did not do it. If it was done by my organization it was contrary to instructions.

[fol. 654] It was to my personal interest because of my contracts to sell beet and Godchaux sugars to customers rather than sugars of American and National, who were also my principals.

I cannot say that we sold Godchaux at the same price as we did American's. I testified yesterday that I sold Godchaux' under the 1926 and 1927 contracts very readily and that it did not begin to back up on me until the last year. In the early part of the contract we sold Godchaux' at the same price as American's and National's.

We cut the price of Godchaux' when it began to back up on us in the last year at a concession of 5¢ and possibly 10¢ but I do not remember whether we did so in 1928 or 1929.

Exhibit L was handed to me by Stubbs of American on March 28, 1930, and deals with the Mesch affair which was a disgraceful thing. I agreed to all the conditions on the paper except as to the trial period, which was Stubb's idea.

Defendants' Exhibit L was received in evidence.

[fol. 655] I agreed with Stubbs to conduct my brokerage service and business activities for American in accordance with the 10 conditions set forth in Exhibit L. He expressed to me plainly his belief that I had not been observing these conditions in my conduct of the sale of American sugars prior to that time.

The information I now have about the Mesch deal leads me to believe that only Edgar made money out of it. This elaborate scheme of deception of 2 of my refiner-principals was conceived by employees for my benefit without prior knowledge on my part. It is my belief now that my employees did not profit from the transaction.

We had a memorandum from Arbuckle stating we had reported the delivery of damaged sugars in 2 ways, one to Lee & Cady and another to Mesch, and asking us to look into the facts but I never saw it until I had written the Abbott letter and never answered their inquiry.

I first began to cut the price of Godchaux sugars in the fall of 1929. I continued cutting until the sugars were sold in the summer of 1930.

At the time the Institute was formed I had known Judge Ballou 20 years. We had been good friends for a period before the Institute was formed. In his personal relations with me where the Institute was involved he treated me with the utmost friendliness and did not act in an arbitrary or unreasonable way. He desired very much that we be [fol. 656] not injured or damaged by the Institute. He knew we were going to be. He knew we would suffer and he wanted to make it as slight as he could.

Defendants' Exhibits M to O, inclusive, were received in evidence.

The sugar buyers' right to transit was changed by Boyd's Tariff adopted in 1930. I know of no rate situation that led to the change. Before it took place there was an advantage in being able to make deliveries of sugar overnight to Grand Rapids because we could ship mixed carloads of different refiners' sugars. Before 1930 the delivered price to the consumer was based on the all-rail rate, which was the rate from Philadelphia to Detroit.

If a refiner shipped from New York, Philadelphia or Baltimore to Detroit and wanted to move the sugar from Detroit to Grand Rapids under transit privilege, he got the sugar to Grand Rapids on the through railroad rate.

Up to a time in 1929 refiners' freight applications at points beyond Detroit were equal to the through freight rate from the nearest Atlantic refining points. Therefore it was to the mutual advantage of the refiner and consumer in Grand Rapids to have sugar transited out of consign-

ment in Detroit, thereby saving the higher combination of [fol. 657] the local rate to Detroit and the local rate outside of Detroit.

Beginning in 1929 the refiners began to absorb part of the transportation charge into Detroit below the lowest all-rail rate. The refiners' selling price in Grand Rapids was based on the through all-rail rate from Philadelphia to Grand Rapids on which there was no absorption.

Mr. Higgins: So the reason the refiners became concerned with the use of the transit privilege was that some of their brokers and some of their customers were combining against them to use the transit privilege in order to beat their prices at Grand Rapids and other interior Michigan points?

The Court: The refiners, in order to get the benefit of something to which they were entitled, did not want to absorb any part of the Grand Rapids rate which they would absorb as they were absorbing the Detroit rate, if sugars bound for Grand Rapids were transited through Detroit. The effect of the broker and customer taking the transit privilege instead of leaving it with the refiner may have been that the refiners would have been compelled to give Grand Rapids the same absorption benefit they gave Detroit.

Mr. Higgins: That is correct.

[fol. 658] By Mr. Higgins:

The standard lake-and-rail rate was the rail rate from New York to Buffalo and the water rate from Buffalo to Detroit. Assuming that the lake-and-rail rate to Detroit was only 2¢ lower than the all-rail rate and that the water rate to Detroit was a great many cents lower, it was the water competition or the rail-and-water competition of the two into Detroit and not into Grand Rapids that brought about the depreciation of the rates to Detroit.

The refiners commenced absorbing 3¢ of the all-rail rate from Philadelphia to Detroit early in 1929, the all-rail rate being 42¢ and the refiners' rate application on shipments into Detroit 39¢.

When the refiners began to absorb 3¢ of the freight on sales in Detroit they were charging their customers in Grand Rapids the full 50¢ through rail rate from Phila-

delphia to Grand Rapids. If we used the transit privilege on our principals' sugars on these sales in Detroit for all that time, we deprived our refiner-principal of 3¢ per bag on his contract with our customers, unless the refiner agreed to it, but if we did that without the knowledge and consent of the refiner-principals and reported to the principals their [fol. 659] sugars were sold in Detroit, we were cheating them of 3¢ a bag. The "if" is a very important qualification in that statement. I cannot testify that my organization actually used this transit billing for this purpose without the knowledge of our refiner-principals—certainly not with my knowledge and consent.

I did not know that this was one of the points to which investigations, not only of refiners' auditors themselves, but of the Institute, were directed in our Detroit offices in part of 1929 and running to 1930 and 1931. A number of audits were made of our books but I do not know if any of them disclosed this practice.

Patterson and Chinal, employees of the Institute, came to my office in December, 1930, but did not tell me what they wanted to investigate. I took the position that when the title of the goods passed from the refiners he was through with the sugar and I would not let them or our refiner-principals see any records which disclosed where or to whom these sugars were sold out of consignment in Detroit because these records were the property of the ultimate purchaser. The charge that I was defrauding my refiner-principals was not made. Patterson said I had been charged with breaking my broker's oath. Beebe told me [fol. 660] that Patterson had a perfect right to see what happened to cane sugar but no right to see what happened to beet sugar.

Where they asked for records of a character we have been discussing, Beebe, under my direction, got the records and in Patterson's presence abstracted parts that disclosed what had happened to the sugar after our sale to the refiner's customers. Beebe and I jointly refused, on the advice of counsel, to disclose what happened to the sugar after our sale to refiners' customers on the ground the refiner did not have any right to know what became of the sugar after the ownership had changed. It did not occur to us that we were defeating our refiner-principal from getting knowledge of whether his transit billing had been properly used by us on his sugar.

I instructed Detroit Harbor Terminals to take the position that the refiner-principals, their agents, or agents of the Institute, were not to be shown any records on transactions involving sugars that had gone into Detroit Harbor Terminals' various warehouses, which would disclose what deliveries or to whom or where deliveries had been made of refiners' sugars, after title passed. We cut off the refiners' right to see the documents when the delivery order [fol. 661] had been given from the consignment and the sugars became the property of another. The delivery order was issued by our office, not as warehousemen holding the goods for the refiner, but as brokers for the refiner.

If deliveries are made locally the transit privilege can be used afterwards by transferring it to someone else.

If an alleged sale had been made by us to a so-called local buyer and the sugars were transited out to some other point, I agree that the refiner would have lost 3¢. Our position that we would not allow our organization or the Detroit Harbor Terminals to show those documents to the refiners' or Institute's representatives would have defeated and did defeat the refiner's attempt to find out whether we were dealing with them unfairly.

When we turned over the billings to a local buyer I do not know whether or not we signed the bill on behalf of the local buyer if he wanted to transit or if he did so himself.

The transit privilege was valuable to Lee & Cady of Detroit because they had branches in Bay City, Grand Rapids and other places and were able to get an 8¢ instead of an 11¢ rate.

Until 1929 the custom had been to give Lee & Cady or [fol. 662] any local purchaser at Detroit any transit bill with a sale so that the local purchaser could get the benefit of any through transit rate if he resold. When the rule was changed and the absorption took place there was no occasion to do this and I have no knowledge of whether it was done despite the fact there was no reason for so doing.

When an outbound movement took place, even if we had sold the sugar to a local purchaser or a purchaser in Grand Rapids prior thereto, Edgar Sugar House as the agent of the refiner had to sign the railroad outbound bill of lading. It seems to have been done in the document which you handed me and if it was done without the authority of the refiner, it was wrong.

The transit privilege even before this time in 1929 when the absorption into Detroit commenced, could not be used lawfully on beet sugar for the outbound movement where the inbound movement and transit billing was cane. I do not know and never gave authority to our organization before 1929 to use transit billing on inbound cane sugar for moving beet sugar outbound. I do not know that one of the purposes of the Institute investigation was to find out whether or not, as the refiners' agent, I was using their transit billing on cane sugar for the purpose of transiting beet sugar outbound.

[fol. 663] At the request of American, on the report that such a thing happened, I employed our traffic man, Wetherall, to make an investigation. He went back 3 years and a day and found a list of 22 cars involving the use of the transit privilege on water-borne and beet sugars.

The entire group of 22 cars involved little and we asked the Transit Bureau to correct the billing and we paid the difference where water-borne sugars had been transited on rail billing. I did not do this upon the repeated insistence of American after a long course of correspondence and several interviews and it is not true that the evidence of that illegal transiting came out bit by bit after r[illegible] investigations. Either the buyer or the refiner r[illegible]ped the benefits from these transactions. It was not possible as far as I know for Edgar Sugar House to get the benefit.

Defendants' Exhibits P to S, inclusive, were received in evidence.

I first proposed the arrangement with Detroit Harbor Terminals warehouse whereby they leased part of our warehouse space for handling the refiners' sugar. When the ultimatum concerning the election we were to make between brokerage, warehousing and merchandising of sugar was presented, and we chose brokerage, we considered what we were going to do with our warehouse space and [fol. 664] took the question up with the refiners. I sent Beebe to New York on May 2 to find out what it was possible to do and he came back with 2 copies of a memorandum from Spreckels.

I cannot answer whether Beebe or I first had any negotiations with Detroit Harbor Terminals concerning the terms of the lease, but evidently it was before the refiners'

committee came to Detroit because when they came the terms of the lease and the compensation to be received by me and Detroit Harbor Terminals had already been talked over between our organization and Detroit Harbor Terminals. As far as I know the rate of compensation of each of the 2 parties was a matter determined entirely by negotiation between us and the warehouse and I did not intend to give the impression by my testimony that the refiners' committee concerned itself at all with these terms.

After leaving our office, the committee met the representatives of Detroit Harbor Terminals and approved the terms. The terms of control and conditions under which the space was to be operated for the storage of sugar was not the only question in which they were interested. The refiners would not have the advantage of locations in which they had been storing sugar and with which they were [fol. 665] satisfied. They did not, in any communication to or conversation with me, show any interest in any feature of the transaction other than the control of the space.

The refiners told us we were not going to be able to store sugar ourselves and while the lease agreement had been satisfactory it had not been nearly as profitable to us as it would have been if we had been operating the warehouse. Assuming that it was right to have our warehousing business divorced from our brokerage business, it has been a desirable and satisfactory transaction. I would not say we were treated with consideration and courtesy in the warehouse matter, even if it be assumed that the Institute or the refiners had the right to ask that we divorce our warehouse business from our brokerage business. I would state that we were treated very considerately in the matter of the warehousing business as far as the Code of Ethics of the Institute permitted.

Two things are to be considered in regard to storage. We have in Detroit a very large number of grocery accounts and it is a great advantage to have sugar at the same warehouse and it is of equally great importance for the refiners to have their sugar at a warehouse where it can be loaded on a truck with other groceries.

[fol. 666] As a result of our lease to Detroit Harbor Terminals the refiners' sugars remained in the same warehouse in substantially the same space they had. The only change

in the situation was that Detroit Harbor Terminals had the warehousing management and handled the sugar in and out and we suffered a loss of the warehousing charges.

We obtained a very large proportion of the income from the warehousing of the sugars in our arrangement with Detroit Harbor Terminals. We furnished the space and light and paid the taxes.

Pitman, sales manager of Revere, borrowed $2,500 from Gold Brand Candy Company, a small confectionery store, giving a note as evidence of the debt. He was unable to pay at maturity and in 1929 came to me for help. I paid the note for him and carried it until his death. Because of his financial condition I did not prove the debt against his estate.

We attempted to recoup our loss by selling sugar to Gold Brand and collecting brokerage. The refiners knew we held the note. We entered the orders and sold the sugar. Gold Brand bought this sugar and the refiners shipped it to Detroit in care of Edgar. Payment was made in Boston. Some of the sugar was sold in Detroit, some in Ohio and the [fol. 667] balance in Indiana. Gold Brand had no plants at Indiana, Ohio or Detroit and this fact was never represented to the refiners who shipped the merchandise. The transaction was finally closed by a payment to Gold Brand of their profit on the transaction. On this one transaction of 2,000 bags there was not sufficient brokerage to repay the $2,500.

I did not make the arrangement personally with Gold Brand. Beebe did, but not under my instructions, so that if we violated our broker's pledge and merchandised sugar and received a broker's commission in addition, I was not responsible. I was only responsible for the telephone conversation with Pitman in which I told him that I would assist him in taking care of his obligation.

This sale had no connection whatsoever with the loan. When the loan was made Pitman told us he would repay it. He was in difficulties and did not want to go to his principals. Revere did not know of it at the time but they found out afterwards.

I cannot give the length of time in 1927 that the differential between beet and cane in the eastern beet territory was 30¢ and 40¢ instead of the customary 20¢.

The Godchaux contract was not very fair for Godchaux

[fol. 668] because we had the power to determine what the differential would be and therefore under such an arrangement the power to determine the price we would pay Godchaux.

In the fall of 1927 it was hard to tell what refined cane prices were because many secret concessions were being given and the price was more or less guess and detective work. Godchaux was not at our mercy, because of our influence on beet prices, as he had an opportunity to decline to ship or to decline to sell if he wanted. He was not forced to sell at the eastern beet price and if the beet price was not satisfactory he could decide and did decide that he did not want to do business on that basis.

Defendants' Exhibit T was received in evidence.

Exhibit T, which is my letter to the Federal Trade Commission about the matter of beet price differentials, as a general statement is correct but it did not cover either the start of the Michigan industry when sugars were sold at very low prices nor did it describe the averages when the differential was smaller than 20 points from the open refiners' list, as we knew it.

This differential of 30¢ to 40¢, about which I testified, was a differential below the refiners' published price and in the latter part of 1927 the refiners' published price did not represent their actual price to very many buyers but it was the only measure we had and it was our measure of competition in the sale of beet. In the late part of 1927 practically all of the refiners were selling to a considerable [fol. 669] number of customers at a substantial concession below the published prices. I would not say the differential of 40¢ was the prevailing price. Our agreement with Godchaux was not only that the list price had to be the measure of something for the beet factory to sell on, but when it was discovered that the cane refiners were selling at the beet price, it was a problem whether we would extend our differential 10¢ or 20¢ or what we would do.

When Patterson sought to examine our files and we had an exchange of telegrams and letters from the refiners I recall that he telephoned Taylor in New York and after some conversation turned the telephone over to me. Taylor asked me to furnish him with the specific files he requested and tender him the papers from that file. Spencer of the In-

stitute and Patterson went out with Beebe to get one of these files. They all returned to my office and again discussed the matter. Patterson said that after having called for one of the specific files Beebe, instead of handing the file to him, insisted on taking some of the papers out of it before allowing him to examine it, although it was a file specifically requested and he told me that it would be useless for the Institute to conduct an examination upon the papers connected with a particular transaction if only [fol. 670] papers relating to that transaction that Beebe selected to exhibit were given him. Beebe maintained that the papers he took out of the file had nothing to do with the transaction Patterson wanted to examine. It was my lawyer's and my position thereafter that if the title changed, the Institute had no right to invesigate further.

Redirect examination.

By Mr. Rice:

I made no greater effort than Godchaux and Revere did, to complete contracts with them. The Godchaux contract was signed early in December and the Revere contract about the first of 1928.

Recross-examination.

By Mr. Higgins:

We began to give concessions on Godchaux sugars and to cut prices in the late summer of 1929. I did not testify we did not give concessions before that but we commenced to have trouble in disposing of the sugars and by December 1, 1929, had accumulated 240,000 bags. We then made serious attempts to sell them. I began to cut prices July 20, 1929, and continued from that time until 1930 until we disposed of them. On December 1 we had on hand 240,000 bags of Godchaux and other brands of sugar which had been exchanged for Godchaux. During the month we reduced our stock to [fol. 671] 150,000 bags; on February 1, 1930, we had 120,000 bags.

I wish to correct my former testimony that my promise to Judge Ballou to maintain prices was in 1929. The fact is that the only arrangement that I had with Judge Ballou that I would maintain prices of our own sugar, that is, those

which were purchased as Edgar & Son's and Isbell Stores', was during the period when I was abroad in February and March, 1928. I endeavored to move the Godchaux sugars when they began to back up on me and at other times when I found difficulty in moving them I indulged in a practice which I called "exchanging." I found an opportunity, where the buyer had entered into a contract for American or National sugars and I had some Godchaux in his neighborhood, to suggest that he accept the Godchaux sugars instead of those he had under contract. The sugars he had under contract would be delivered to me in Detroit and I would market them in Detroit as a more convenient area and in that way would make a deal which would meet with his satisfaction and ours, too. I do not ever remember attempting to correct that practice or issuing orders against it. I have no recollection of whether I approved it or disapproved it.

I think most all of the time we were doing it some of the refiners and some of the Institute members knew we were. I think we made statements to them that we were exchanging sugars. I would not recognize the fact that we should not do that in view of our broker relationship with other [fol. 672] refining companies without their express consent. I think as long as I had the Godchaux contract and sugars to sell it was perfectly proper to trade sugars in order to move them out. I cannot see how the refiners' interests were hurt.

[fol. 673] T. E. Hopson was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I am president of the A. B. C. Candy Company of Sherman, Texas. The company was established in 1908 and incorporated in 1920. It sells candy. It does not merchandise sugar or any product other than candy. It consumes about 45,000 bags of cane and 75,000 bags of beet sugar per year.

Our company has owned a warehouse for about 15 years. Its records are all kept by the candy company. The employees of the warehouse report withdrawals of sugar to our

office. Our warehouse building is of brick and mill construction and is dry except on the candy making floor. We have a comparatively low insurance rate.

We have stored sugar for the account of refiners on the first floor of the warehouse where we also store some of our corn syrup and coconuts. We did not store sugar other than that of refiners on this floor. We first started with Great Western in 1925. We did not solicit this storage business. They came to us. We started storing cane sugar late in 1927. The storage business ceased about the middle of October, 1930. We stored cane sugar for C. & H. and Imperial and several beet companies. Prior to October 1930 some of the [fol. 674] companies began to withdraw or to allow their stocks to be eliminated and our warehouse is now idle.

Mr. Fly: At this point I would like to read from the Minutes of the Executive Committee meeting of July 23, 1930:

Headed "A. B. C. Warehouse Company, Sherman, Texas. The Committee found that this warehouse was affiliated with the A. B. C. Candy Company and recommended that it be disqualified."

The stocks of the refiners are now kept in the L. Andrews Company's warehouse in Sherman. This warehouse, which is an old wooden structure, is owned by a man who also deals in coal and grain.

The first floor of our warehouse was about on the level of the car doors which made it easy to unload on these floors, so we used them for storage. It was unnecessary to do any lifting to get the sugars out.

Some time before our stocks were withdrawn an investigator of the Institute was on our premises. He said he wanted to check up on A. & P. withdrawals and then asked to see the warehouse, which I showed him. I do not recall that he asked about the relationship between the warehouse and the candy company. I told him that we handled the warehouse business entirely separate from the candy business.

In our negotiations for the storage business, I dealt with Oliver, Taylor Company, a sub-broker for Seavey & Flarsheim who were brokers for C. & H. and W. W. Overton & Company, brokers for Imperial. Oliver visited our ware- [fol. 675] house. I don't recall whether he took care of all the arrangements when they started storing, but he is the

one with whom I dealt in connection with anything coming up concerning the storage. I spoke to them afterwards about the withdrawal of stocks. I never heard of any complaint about our warehouse or the way we were doing business. I dealt with these brokers after the stocks had diminished, in an effort to get the storage stocks reinstated. They said the way we handled the warehouse was satisfactory.

I wrote to the refiners' brokers and possibly the Institute and the Domestic Sugar Bureau, but I lost my files the first of this year. I do know I tried to hold business. Since the first of 1930 I have had some correspondence with these brokers, but I did not succeed. Oliver, Taylor & Company wrote their files had been destroyed, when I requested them to send me copies of my correspondence with them.

I have never sold anything but candy, did not merchandise sugar and am not a sugar broker.

Petitioner's Exhibits 298 to 302, inclusive, were received in evidence.

Mr. Fly: I should like to read here the minutes of an adjourned meeting of the Board of Directors of January 30, 1931.

"A. B. C. Warehouse, Sherman, Texas.

"The Executive Vice Secretary read a letter from Texas requesting that consideration be given to the reinstatement of the A. B. C. Warehouse at Sherman, Texas. After discussion upon motion duly made and seconded, the directors voted to make no change in the findings of the Executive Committee at its meeting of July 30, 1930, to the effect that this Warehouse was affiliated to the A. B. C. Candy Co."

[fol. 676] We had forms on which we kept records to report the withdrawal of stocks to the refiners. Some of the refiners furnished their own and sometimes we used ours. We were able to tell at the close of each business day just how much sugar in our warehouse belonged to each refiner and every night we mailed our report of withdrawals. They were never withheld to take advantage of a price or for any purpose. It was our invariable practice to report the sugar out on the date on which it actually went out. We never mingled the stocks of one refiner with those of another. They were kept in separate stacks. We never had sugar

belonging to our company on the same floor and withdrawals for our candy company were never less than 50 to 100 bags at a time. These bags were then taken to a different floor of the candy plant and we reported each on the date of the withdrawal.

The Williams Eubank Company, Everhart Grocery Company and possibly the Waples Platter Grocery Company, the A. & P. and the Nehi Bottling Company used sugar which was stored in our warehouse.

Our company never dated back a report, took advantage of an advance, withheld a report to take advantage of a decline or participated in any way in the giving of a rebate or concession. We did not collect any storage for sugar not actually stored in the warehouse and never re- [fol. 677] ceived any complaint as to our rates. We never entered into any agreement with the refiners and brokers as to how hard and lumpy sugar should be handled. We took this kind of sugar at the full market price. There was not a great deal of it because we kept the store house in a nice condition. The reason we took the hard and lumpy sugars was that in making candy it had to be melted anyway so there was no difference. In that way we kept the other sugar in a nice condition for the jobber and householder. Our company wanted to give satisfaction and keep the customers of the refiners satisfied.

Petitioner's Exhibit 303 was received in evidence.

Cross-examination.

By Mr. Peck:

The A. B. C. Storage Company is not a corporation. It has no separate identity from the A. B. C. Candy Company. We designated the A. B. C. Storage Company in order to keep the records separate from the candy company. The A. B. C. Storage Company is merely a name. The storage company does not have any employees separate from the A. B. C. Candy Company and only hires labor to load and unload sugars.

[fol. 678] In addition to C. & H. and Imperial, we stored Snow White, a brand of Porto Rican sugar. The candy company does not use cane sugar other than that of Imperial and C. & H. There are no sugar brokers in Sherman. The nearest is Dallas. When the candy company pur-

chases sugar it deals through the same sugar brokers who ordered stock out of our warehouse.

C. & H. stopped shipping sugar for storage in our warehouse October 18, 1930. I do not know just what date they withdrew their stocks from the warehouse. I do not think we had any sugars there in October 1931.

Since sugar was no longer stored with us, we took delivery from Andrews & Company. Stocks of sugar are maintained by American, C. & H. and Imperial subject to our withdrawal or any other customers in Sherman. American solicited the business of the A. B. C. Candy Company and we bought sugar from them but not since 1920 or 1921. Since 1928 the A. B. C. Candy Company received all the postings of American and we probably have bought some powdered sugar from them since 1928. I think in the early part of this year we bought about 50 bags of hardened sugar that was stored in the Andrews Company's warehouse.

[fol. 679] I do not recall advising the broker for American that I would buy sugar from them if they put a stock in the A. B. C. warehouse. I may have solicited their storage business. I did say that if they put it in there, I would have used some of it. I have never bought sugar from Texas. They have solicited my business. I suggested to their broker if they wanted to sell sugar to my company they should put a stock in its warehouse.

[fol. 680] ALBERT WILLIAM BEEBE was called as a witness on behalf of the petitioner.

Cross-examination.

By Mr. Higgins:

We cut prices when the Institute urged us to dispose of the Godchaux stocks. I do not know whether the Institute wanted us to cut the price or did not want us to.

In the summer of 1929 under an arrangement with Spreckels we acquired some of their stocks and also acquired sugar of various refiners by exchanging our Godchaux stocks.

I have been associated with General Edgar since 1919. From 1924 until 1930 I was purchasing agent, handled the finances and dealt with the refiners for W. H. Edgar & Son, the merchandising company. When Edgar & Son elected to

become a broker in 1929 I managed its sales, purchases and financing and have been general sales manager of Edgar & Son since January 1, 1930.

I am Secretary of Edgar Sugar House and treasurer of Isbell Stores. When Edgar Sugar House acted as broker, prior to 1929 I dealt with the refiners and purchased the sugar which Edgar & Son and Isbell used.

Defendants' Exhibits W and X were received in evidence.

[fol. 681] We used the refiners' transit billing to ship the sugars which we had acquired in exchange for our Godchaux sugar in 1929 and early 1930.

We merchandise the American or the National sugars in our name as our sugars and used their transit billings on them to avoid a freight absorption on Godchaux' sugar. It would appear that on the transactions represented by the documents in Exhibit Q that the transiting was for the benefit of Edgar, not the refiners.

The following Defendants' Exhibits were received in evidence:

Exhibit Y	Exhibit F-1
" Z	" G-1
" A-1	" H-1
" B-1	" I-1
" C-1	" J-1 and K-1
" D-1 and E-1	" L-1

Before the formation of the Institute American was the only company that audited stocks. An arrangement had been made with them whereby the oldest lots of sugar [fol. 682] were reported first and one lot might be short and the other over. We were to have more than enough sugar to cover their entire consignment. We did not report to American when sugar was delivered out.

Before the Institute it was not the practice of the Edgar concerns to keep separate accounts of their warehouse, brokerage and merchandising activities to enable them to determine which was the refiners' sugar and which was theirs because the stocks were run together. The only sort of an audit the refining companies could make was one which would determine whether or not both our merchandise sugar stocks and brokerage stocks together were enough to meet what the refiners charged against Edgar as

purchaser and against Edgar as broker. We might be short in Akron and long in Cleveland and we might be short in 10s and long in 8s, but there was always more than enough sugar to cover every consignment that the refinery had with us. The date on which sugar was transferred from consignment to purchased sugar was the date the report went into the refinery.

The distinction between stocks consigned to Edgar as broker and his own stocks was important because the date [fol. 683] of delivery, that is, the day the D from C was issued, determined the price, unless there was a contract.

The sugars merchandised under the Godchaux contract and those which we were reselling for customers and those we acquired in exchange for Godchaux were carried separately on our books in 1928 and 1929 but were kept together in the warehouse.

Defendants' Exhibit M-1 was received in evidence.

Edgar & Son the merchant had a stock sheet for each warehouse. The sugar was plussed on to that stock sheet without separating it as to lots. We might have at a warehouse 10,000 bags of bulk sugar in the morning, plus on to that sheet that day 2,000 bags and ship out 6,000 bags. We have nothing that would enable us to connect up and testify whether the 2,000 bags that came in that day went out as part of the 6,000 bags and there never has been anything which would show which incoming lots connected up with the outbound lot.

The sugars that were plussed on the Edgar stock sheet and which Edgar merchandised were the Godchaux and Revere sugars purchased after the Institute was formed and the sugars which we exchanged for them. No further [fol. 684] record was kept of the individual deliveries.

When representatives of the Institute, Patterson, Chinal and Spencer, came to Detroit in December of 1929, January, February and March of 1930, and again in May of 1930, we refused them access to certain records, because they had not given us the car numbers. We told them that where some customer had bought sugar and paid the bill to the refinery then they would have to secure the consent and do the auditing for the men that had paid for the sugar as far as the delivery of the actual sugar was concerned. We never refused them any records of the refiners. Our statement to them was that it was no longer a record of the re-

finery when title to the sugar had passed to a customer, that is, when the customer had bought and paid for the sugar.

Castle of National gave me the same instructions in December of 1929, that they had no interest in the matter if the title had passed on the sugar. This matter again came up when Chinal was making his Indianapolis investigation, and Stubbs of American agreed with me at that time that if the customer paid for the sugar, then certainly Chinal had no further right to investigate. This matter also came up with Fred Taylor of the Institute, and he told Mr. Patterson the same thing, in my presence, that they were trying to go too far in checking up after the sugar had been delivered to another customer.

We instructed Detroit Harbor Terminals not to give the Institute auditors any records concerning the delivery of any storage stocks other than the refiners' storage stocks. We instructed Detroit Harbor Terminals to refuse to give the Institute investigators access to or inspection of the records as to the handling of the sugars which we sold as broker for the various refining companies after we had reported to the refiner that we sold those sugars locally in Detroit.

If any question of transiting or diversion was raised as to these shipments the refiner could determine the facts by furnishing us a request for the transit records of the car. So far as the delivery of the sugar was concerned, if the billing of that particular car was used in transiting, we never refused the Institute auditors or any refiner any record on transit or any record that we had.

Our sole reason for refusing access to our records on these shipments was that the refiner had not given us the specific car numbers. And my sole reason for refusing the refiners access to the records of Detroit Harbor Terminals and instructing Detroit Harbor Terminals to refuse access to those records was because the refiners had not specified the car numbers. We never instructed Detroit Harbor Terminals not to give records on lists of specific car numbers concerning transiting, and if that was refused it was done without our instructions.

I did advise Patterson that after the sugars were delivered, concerning the records on the further delivery of those sugars by the customers, after he took delivery of them and they were invoiced to him, we could not go any further

unless we received instructions from the principal that owned the sugar. Transit records would have disclosed whether we participated in transiting and we never refused those records.

As Edgar & Son did not keep records which would have identified the outgoing with the incoming shipment, I do not believe the refiners, except by access to our records, and records of a character which we did not keep, could identify the shipments of sugar on which refiners' transit bills had been used. Even if we had given the refiners access to our records they could not determine whether or not their transit billing had been used to defeat their freight application on a sale of their sugar.

[fol. 685] Since the refiners had no means of determining from Edgar & Son's records what particular sugar went out in a particular car I know of no way they could determine whether the transit billing had been illegally used to transit water-borne sugar.

After sugar which we acquired in exchange for Godchaux' was paid for, the refiners were unable to trace such sugar because of the way our records were kept. Their connection with the transaction and information about it ended at the time we sent out a D from C.

Prior to the time we received the notice in 1930 the actual sugar could not be tied up with a freight bill to enable the refiner to identify a particular carload of sugar that went out of our warehouse or went out of our stock at Detroit under the transit bill, with the sugar that had moved in under the transit bill. As long as we were merchandising we never kept lot cards connecting incoming with outgoing shipments, except for one period in 1930.

[fol. 686] It was the practice to put transit sugars in certain sections of our warehouse and water-borne sugars in other sections. In our warehouse the sole way we had to determine whether or not the sugar was entitled to transit was to know on what floors particular sugars had been stored and in what section of the warehouse they were stored, not merely what floor but what portions of certain floors. If the refiners attempted to investigate at any time whether their billing was being used unlawfully on water-borne sugar, they would have to know the particular sections of the particular floors upon which sugar had been stored and know it had actually arrived by rail or water.

When merchandising, all Edgar & Son had to do in order

to use transit billing illegally was to take sugar by mistake or otherwise from a particular section of a particular floor instead of from another section of that same floor.

I was not familiar with the fact that the railroad tariffs under which we transited these sugars specifically required the shipper to show how the inbound sugar came in that was moved out on the transit billing. I was not aware that as a transit operator Edgar & Son had to keep their records [fol. 687] to show how inbound sugar came in that was moved out on the transit billing as provided in Rule 3, "Records," of Exhibit 264. I do not know when it came to my attention that our records did not contain information that would enable the refiner to identify the particular outgoing lot with the particular incoming lot.

I have never seen Exhibit E before, nor was it written under my direction.

Petitioner's Exhibits 332 to 335, inclusive, were received in evidence.

Defendants' Exhibit B-2 was received in evidence.

Under our method of operation there was no way of telling, either from Detroit Harbor Terminals' records or from ours, whether a particular shipment of sugar which moved out under transit billing was all or any part entitled to transit privilege. Only the warehouseman at the time of loading could tell whether or not it was water-borne sugar that went out.

The warehouseman had the transit sugars of Edgar's stock on certain floors or certain spaces in the warehouse and kept the non-transit sugar in another space. We have no record at the present time, nor did we have at that time, of sugars which were transited and which were not transited. The warehouseman received the order to load and it was his duty to see that there was nothing but transit sugars that went into the cars but we have no records. The man who attends to shipping Edgar's own stock out knows from its location in Edgar's part of his own warehouse whether that particular sugar originally came into Detroit with transit privileges or not.

If the warehouseman took rail sugar from the water-borne pile he was transiting illegally. There is nothing that I have been able to locate in the records that would separate the lots so as to tell now or at any time from

Edgar's records whether he had participated in a plan for illegally transiting sugar.

[fol. 689] Edgar & Son adopted a practice of selling Spreckels sugar from various points where Spreckels had it on consignment. This practice was known as an exchange of sugar and also as the "plus and minus system".

We would first purchase in Detroit 10,000 bags of Spreckels sugar, by contract or otherwise, which we then owned as merchants. Some time later one of our customers in Chicago bought sugar from us. We had no sugar there but Spreckels did so we took over 10,000 bags which they had, but at the same time retained ownership of the Detroit sugar.

The price which we paid for the Chicago sugar was the price at which we sold the Detroit sugar at some later date. Spreckels billed us for Chicago delivery and invoiced at the price on the date the billing was reported to them unless there was a contract.

At the time of the exchange no notice was sent to Spreckels that they were minus 10,000 bags in Chicago and plus 10,000 in Detroit.

The Court:

I still have to get the exchange. I have not found out what exchange there is. You told me you took their sugar in Chicago; that you yourself owned their sugar in Detroit. You did not give them your Detroit sugar. I can understand if you took the Chicago sugar you transferred back to the consigned goods the 10,000 that you had bought and paid for before that time and held in Detroit. That would be a pure exchange. That I can understand, but I confess I cannot understand that transaction either factually, legally, morally, or in any other way.

By Mr. Higgins:

The transaction was carried out by bookkeeping entries on Edgar's books in Detroit. The minus was shown in red ink figures and the plus in black ink figures on stock sheets which carried records of our sugar at points outside of De-
[fol. 690] troit. Spreckels' books continued to show for an indefinite time that they owned 10,000 bags in Chicago. There was no actual transfer of the sugar in Detroit. The

entry of the plus on the stock sheet was made prior to the time delivery was made to the Chicago customer.

Our books showed Edgar had 10,000 bags in Detroit and was short 10,000 bags of Spreckels' Chicago consignment and that someone other than Edgar owned the 10,000 bags in Detroit.

There were no ledger entries on these transactions to keep our books in balance. The shipments appeared only on the stock sheet as a minus and we could only determine what consignment was bought when the stock began to run out. There was no way of telling from our books or entries who owned the Chicago sugar and the Detroit sugar. If there was a plus and minus of the same amount the stock was in balance but when 50 bags were sold in Detroit the stock sheet showed a minus 10,000 in Chicago and a plus 9,950 in Detroit. Our stock clerk would automatically buy in enough of the short sugar to make the stock sheet a plus figure as we never wanted it to show on balance a minus.

The stock clerk gave an order to our traffic department to make an actual purchase of one car of 600 bags of sugar and report that one car to Spreckels for invoicing. The red ink figure for Chicago was then reduced to 9,400. The [fol. 691] black ink figure for Detroit was now 9,950, so we had a plus stock of 550 bags. The affect was the same as if we had taken one carload of sugar from Spreckels' stock in Chicago.

We continued to sell the 550 bags without further reporting. The profit and loss made on the Chicago transaction was offset by the profit and loss on the sugar which was carried in Detroit. As a rule we did not report to Spreckels delivery for delivery but generally reported to them large quantities at a time after the sugar was used in Detroit.

If we had a contract we reported in 5,000 or 10,000-bag lots. If we had no contract we reported in carload lots. If we thought the market price would advance we probably contracted for all the Chicago sugar. If we thought the price was going down we reported carload deliveries. On an advancing market we probably sold to Detroit customers and then covered by making a contract for the Chicago sugar.

Arrangements for these exchange transactions were customarily made with Harper and Stone. We made a similar arrangement with American in 1923 and continued it until

1930. The existence of the arrangement was not known to Stubbs or White.

Neither Harper nor Stone ever made any request that this matter be handled in a more businesslike way so that their books could be kept and they could be advised from time to time as to how much sugar they owned and where and at what price.

[fol. 692] Mr. Higgins: I ask you if it is not a fact that Spreckels, American, National, Revere and Pennsylvania were, during the latter part of 1929 and the early part of 1930, auditing your consigned stocks all over the country, finding shortages everywhere in those stocks, finding that deliveries had been made months before by the Edgar organization out of those consigned stocks and billing Edgar up for those shortages on the dates when they were discovered—at the dates when the delivery sheets of the various warehouses showed deliveries had been made out of those stocks, with Edgar offering to the refiners at that time arbitrary D from Cs, representing no real transaction of any sort, as of the date of the D from C or the invoice, or as of a date in 1930, days prior to that time, when the price of sugar was the lowest?

Witness: We had been working with American for years under this arrangement. In the fall of 1929 American put in new rules covering the way they wanted to work and tried to make the rules retroactive. We had never been advised of any change in the situation and went ahead under the old system. When American came around in the spring of 1930 on one of the annual audits which they made, they went back for a year and summarized all of our busi-[fol. 693] ness. They made the new order retroactive to the previous year.

Pennsylvania only audited its stocks in Illinois and came there at our request to straighten out their stock and American's. I do not recall any audit of our books by Godchaux or Revere.

National audited its stock in Detroit in early 1930. There was a considerable mix-up in our records and in the warehouse records of Detroit Harbor Terminals regarding deliveries which we had made for them. We had this old system of bookkeeping which we used in merchandising and

were trying to switch over to the brokerage but were still continuing this merchandising to dispose of the Godchaux sugars which we had acquired by exchange.

I might have told American at the time we were entitled to this sort of switching and to determine from some plus or minus system on our books in Detroit whether we had their stock in Detroit or elsewhere.

Edgar always had sufficient stock to cover consignments that were short. By his system of accounting his records showed shortages all over the country but he had in his name in various warehouses enough to counterbalance the shortages.

[fol. 694] Some of the apparent shortages in the stocks at the various warehouses may be accounted for by the fact that there had been exchanges between Spreckels stock at outlying warehouses and Edgar's stock whereby Edgar took over the Spreckles outlying stock and made some entry by a plus sign on his own stock records at other warehouses, indicating that, in place of the stocks Edgar had taken over from the outlying warehouses, Spreckels was now credited on Edgar's stock records with a corresponding amount of stock at some other warehouse.

Defendants' Exhibit C-2 was marked for identification.

Defendants' Exhibit D-2 was received in evidence.

Defendants' Exhibits E-2 and F-2 were marked for identification.

Defendants' Exhibit G-2 was received in evidence.

Defendants' Exhibit H-2 was marked for identification.

After examining the documents from our files and Detroit Harbor Terminals' files, your representative and I have succeeded in agreeing upon the summarized statements of the facts in these documents. The schedule referring to the 279 [fol. 695] cars which were listed in schedule A of the first subpoena contains the agreed statement as to material facts.

Defendants' Exhibit J-2 was received in evidence.

The 6 photostats of delivery sheets showing the details reflected in Exhibit J-2 are those which your representatives and I worked out.

Of the 279 cars listed in schedule A of the first subpoena I have listed 11 as duplicates, 1 error, 1—no documents found, 12 miscellaneous cars that were not transited, 73 non-transit

cars involving Spreckels' transactions and 1 of Sno-White, which was also a non-transit car. That leaves 180 cars that were transited. Of the 180 that were transited 56, included in the portion of this summary under the letter "A" followed by the heading "56 cars transit billing shipments," are the cars that were specially designated out the first subpœna under a request made in open court for the production of the documents relating to the special 56 cars. Out of the 56, 39 were taken from Edgar's stock or someone's, like Lee & Cady's, and shipped out for Edgar's account. Of the 39, 2 full cars contained entirely water-borne sugar. Of [fol. 696] the other 37 there were no records whatever either in the Detroit Harbor Terminals or the Edgar files showing the origin of the sugar. There was the brand on quite a bit of it but no record whatever as to the origin, but there was no record showing whether it came in D. T. & I., water-borne or how it arrived in Detroit.

In the next group of 7 cars which were entirely for refiners' account, on the outbound shipment for Detroit, there were included 200 bags of D. T. & I. sugars and there were properly transited 2,930 bags. The record showed it came in by rail to Detroit or on National Despatch route so that it was properly transited. It did not come in water-borne and did not come in D. T. & I.

Of the next group of 10 cars, which on the outbound shipment were partly loaded with sugar for Edgar's account and partly with sugar for the refiners' account, 706 bags came in D. T. & I. and 1,724 came in on the other routes, neither D. T. & I. nor water-borne. These 2,037 bags were Edgar's, loaded from Edgar's stock. Of the total of 56 cars, 906 bags which were transited came in D. T. & I., 1,215 were water-borne and 4,659 came in by some other route than water-borne or D. T. & I., and 19,287 bags, all shipped out for Edgar's account, came in by an origin not shown by any papers.

[fol. 697] Of the remaining 124 cars of the first group 71 were all outbound shipments for Edgar's account. In that 71 there were 1,200 bags of water-borne sugar and 800 bags of beet sugar and there were, of the Edgar outbound shipments or shipments for Edgar's account outbound, 31,240 bags as to which origin was not shown. In all cases where the origin was shown, the outbound transit was a transit either of water-borne sugar or beet sugar. Those are the

4 cars that were corrected that were first mentioned here in Court after the subpœna was served in February of this year.

In the next group of 31 cars, there were 2,079 bags of D. T. & I. arrivals, 2,100 bags of water-borne arrivals and 7,435 bags in 27 cars which did not arrive in Detroit either water-borne or D. T. & I. There were 2,560 bags, the origin of which was not shown.

In the final group of combination shipments where 22 cars contained sugars partly for Edgar's account and sugars partly for the refiners' account, 1,232 bags shipped for the refiners' account arrived D. T. & I.; 914 bags for the refiners' account arrived water-borne; 2,892 bags shipped for the refiners' account arrived by some other route than water-
[fol. 698] borne or D. T. & I.; 4,407 bags were shipped for Edgar's account, origin not shown; and 563 were shipped for the refiners' account, origin not shown. The grand total for the 124 cars is as follows:

3,311 bags arrived D. T. & I.
4,214 bags arrived water-borne
800 bags arrived beet
10,327 bags arrived by some other route than D. T. & I. or water
38,770 bags arrived from an origin not shown.

Out of the 124 cars, there were included some that were corrected. In 1930, 18 or 19 were corrected and the memorandum in the last column indicates what has been corrected and when.

There are no papers in our files or Detroit Harbor Terminals' files regarding a total of 19,287 bags in a group of 56 cars and 38,770 bags in the group of 124 cars and I cannot tell what our practice was in our warehouse or in our space in these warehouses as to the piling of these sugars as I am not familiar with the warehouse procedure. I do not know what steps were taken in our warehouse to keep transit sugars separate from non-transit.

I never gave any instructions to our warehouse employees as to how they should avoid illegal transiting. I did not handle the transiting or any division of it and I am not familiar with it. It was my idea to get American to stop shipping sugar into Detroit via D. T. & I. because we got no
[fol. 699] transit billing on it that was of any use to us. At

the time we exchanged correspondence with Ripley and failed to get his consent to stop shipping by D. T. & I., I did not issue any instructions to our representatives to stop transiting D. T. & I. sugar.

If the figures in the summary prepared by Crosby, who worked jointly with me in the preparation of this detailed sheet, show that 4,079 bags of the D. T. & I. sugar were transited after Ripley's refusal of our request and 130 were transited before, I do not doubt the figures.

Defendants' Exhibit L-2 was received in evidence.

Referring to the next group of 74 cars in the schedule attached to the first subpœna and which were not transited and which relate to Spreckels' transactions, your representative and I have agreed upon a summarized statement of the situation as to those cars which are not involved in the transit question.

Of the 74 cars, 19 containing 8,200 bags are shown by the records to have gone to the same customers at the destination as is reported by Edgar to Spreckels in the Q number blanks. [fol. 700] Of the 24 cars in the next group, the papers produced indicate that the Spreckels' sugar went to the same destination point as reported in the Q number sent to Spreckels on the same date. Detroit Harbor Terminals' loading sheets were produced for 10 of the 24 cars. They indicate Spreckels' sugar was shipped. Edgar's loading sheets were produced for 3 cars and indicate that Spreckels' sugar was shipped. No Detroit Harbor Terminals' loading sheets were produced for 14 cars. The Edgar loading sheets that were produced indicate no brand, but in all of these cases #4 DO, filed as was customary by Edgar Sugar House, indicate Spreckels' sugar was shipped. In these 24 the DO showed the loading into the car number on the date of the delivery exceeded Spreckels' sugar loaded, gave the lot number that it came out of in the Detroit Harbor Terminals' lot space and tied it up on the whole 43 cars, the 19 and the 24.

In the next group of cases marked #3 on Exhibit M-2 the papers covering 12 cars containing 6,180 bags, indicate that the sugars shipped to the Q number destination point of which Spreckels was advised, were unidentified brands and assortments which differed from the Q number assortments. In four of these cases the consignee was not as re-

ported on the Q number because there was a change of [fol. 701] name showing a resale.

In the group, marked #4 on Exhibit M-2, as to 17 cars, the papers produced are incomplete and do not show whether or not Spreckels' sugar moved as reported in the Q numbers. To complete the total of 74 cars, in one case shipment was cancelled and in one case no white sugar went out. We are not exactly positive that that shipment was cancelled but the DO that he had, had "cancelled" written across it and the warehouse furnished no papers, which indicated that it was not positive.

Defendants' Exhibit M-2 was received in evidence.

The papers regarding Q-217 show a Q number not sent to Spreckels and a sale and shipment of sugars to the A. & P. They also show Edgar's loading sheet indicating a shipment for the account of Isbell Wholesale Stores, for W. F. Childs & Company, and a shipment to Vandever at Franklin, Indiana. These transactions, where our advice to the Spreckels organization showed a sale and shipment to A. & P., but our papers not sent to Spreckels, showed sales to the account of Isbell Stores and Edgar for the account of W. F. Childs and some third or fourth party, were really sales of sugar for the A. & P. account. This contract ap- [fol. 702] parently was taken over in one of those exchange transactions of Godchaux sugar for some other sugar and this Spreckels contract with A. & P. was in our stock because of the exchange. The contract was made against our stock which included numerous contracts with refiners whose sugar had been exchanged on previous transactions and had come into our stock. The contract had come into our possession with some exchange we had had through A. & P.

We advised Spreckels these sales were for our account and not for A. & P., because, as far as they were concerned, when they entered into the contract it was originally for the A. & P. but had come into our possession through the exchange when we delivered other sugar to them out of spot stock. The original sale was for the A. & P. account and this had to be applied on the A. & P. contract. It was not the practice of A. & P. to overbuy with the result we had second-hand sugars for their account.

I do not remember any case where A. & P. entered into

an agreement as I have described in my prior testimony whereby they overbought as a speculative venture and turned over to us sugar for sale secondhand.

The 100 cases attached to the first subpœna marked Schedule C represent cases where sugars were trucked by [fol. 703] Edgar to Detroit during the period from July to December, 1930, and included sugars of Revere, Arbuckle and American. Deliveries were made to miscellaneous customers, among them, Jersey Farm Baking Company, Orchard Farm Pie Company, Lee & Cady, Feigen Brothers, A. & P., Wolf Wholesale Grocery, Shafer, W. J. Foley, R. M. Martin and National Tea Company. There were also included quite a few warehouse transfers. This was during the period or after the period Edgar had signed the broker's pledge and agreed not to truck refiners' sugars.

Referring to the 127 cars in the second subpœna, 15 out of a total of 25 were cars which I testified I thought the transaction typical of our handling of Edgar's sugars. These 25 cars are not included in the 74 contained in Exhibit M-2. These cars, however, were the same kind of transactions because they were shipped to local points for Spreckels on the local rate. They were embraced within the arrangement I claimed to have had with Harper.

Patterson and I have agreed upon an analysis of 15 out of the 127 cars under subpœna number 2 as shown by that typewritten schedule.

Defendants' Exhibit N-2 was received in evidence.

[fol. 704] In the 4 cars out of these 15, the customers on the Q number form sent to the refiner and on the bill of lading were the same. In 11 cases they were different. As to 5026 bags, the papers do not show the brand of sugar which was shipped out of Edgar's stock and in 7 cases where the brand is identified there was in no case Spreckels' stock. As indicated on the side, 405 bags were National or American. The next column shows the price at which Edgar invoiced the sugar to the customers and in the case of 3 cars the customer to whom the sugar was invoiced was Edgar himself. In the next column under the heading "Spreckels invoice" is shown the price at which Edgar invoiced the sugar to the customer and advised Spreckels that the sale had been made. These sugars were all applied on a certain contract at a certain price. When presented, the contract

was approved by Spreckels. It had been made 3 months before and was still open. The price had been automatically fixed when the contract was made. The net result as shown in the last two columns marked "Edgar's Basis" and "Spreckels' Basis" was the price at which Edgar invoiced the customer who finally took the delivery of the sugar. The column marked "Spreckels' Basis" was the price at which Edgar purchased the sugar from Spreckels on the exchange transaction. This contract was probably procured for Edgar in the exchange of Godchaux sugar which had quite an advance in the market at the time when the [fol. 705] contract was entered for the original customer.

Transactions of this sort left the door practically wide open for Edgar to claim that that was either an exchange or sale of sugar secondhand or he could sell for the account of Edgar, A. & P., Childs or Spreckels. As far as the refinery is concerned its contract would be at a price Edgar would confirm.

Defendants' Exhibits O-2, P-2 and K-2 were received in evidence.

Redirect examination.

By Mr. Rice:

All of the 180 cars included in Exhibit J-2 were transited in the last 6 months of 1929. There were some in October or November, 1930, but the date covers from July 1, 1929, until the fall of 1930. The bulk was between September, 1929, and April, 1930. During all that period we were merchandising Spreckels' sugars and sugars which we had exchanged for Godchaux' sugars and were also completing our merchandising activities.

Chinal and Patterson came to Detroit on the investigations of Edgar's activities in December, 1930. About ⅔ of the 180 cars were investigated by Chinal while he was in Detroit. The second column of Exhibit J-2 shows a total of 27 out of the 180 had some water-borne sugars. Of these [fol. 706] 27, 22 were corrected prior to the service of the subpœna and 3 cars, with a total of 1,280 bags, were corrected after the subpœna was received. My attention had never been called to these cars prior to that time.

I do not know of any other cars out of the 27 where there may have been improper transiting which has not been

corrected. I had not known of even these cars except I knew that some had been corrected in 1930.

Of the 27 cars listed as water-borne shipments, there were 4 for Edgar's account; there were 2 out of the 27 in the last 124 cars for Edgar's account and all the others were for the refiners' account. In 25 out of the 27 cars there is no way, to my knowledge, W. H. Edgar could profit by transiting sugar for refiners' account under improper transiting. If anyone made money, it was the refiner. As to the 22 cars which were corrected prior to the service of the subpœna, W. H. Edgar paid the difference out of its own pocket to the Transit Bureau. We plan, however, to divide the responsibility with the warehouse.

Of the 27 cars, 18 were corrected in 1930 and 3 after the subpœna was served. None of the 7 that have been uncorrected were for Edgar's account. I would estimate the total amount of the difference on the 27 cars of water-borne sugars that were transited to be $1,000, but that is just a [fol. 707] wild guess because I am not familiar with this. Of those 27 cars, only a total of 4,214 bags were water-borne and at the rate of 400 bags a car it would approximate 10½ cars, or at the rate of 600 it would only be 7 carloads. I know of no reason why Edgar should transit water-borne sugar for the refiner if it chose to defraud the refiner, and there is no possible gain to W. H. Edgar that I can see at the minute.

The facts concerning the trucking which is shown by the documents subpœnaed under the first subpœna are as follows:

They were emergency deliveries and we did the trucking for the Jersey Farm Cake and the Old Orchard Farm Pie, which were the same as the Grennan Bakery Company. Most of the deliveries went to these 2 firms. There were quite a few deliveries, for the warehouse, of refinery stock where we would want to ship out a car of American sugars from #2 and there would not be sufficient assortment there of the grades they wanted in the car. That assortment might be at #1 and #4 Warehouses so we could truck the sugar across town to get it to the warehouse where it could be shipped out in this particular car. There were also deliveries to buyers like Lee & Cady. They would send their truck to #1 Warehouse for Domino 12-5s. They might [fol. 708] not be able to get 12 cartons at that warehouse

but refused to go to another because it was only a block away; so we would make a transfer to them because the refinery did not have the assortment, and finish the lot they came after.

We made special truck deliveries under a special arrangement with A. & P. but that was discontinued prior to the time of this report.

I have never given instructions to my warehousemen to load water-borne sugars for transiting nor do I know of anyone else in the Edgar organization who has given such instructions. We have corrected some where it was done but I could not say why it was loaded or anything about it. I think it was through error that it was loaded, if any was loaded.

I do not have any documents by which a refiner has ever authorized Edgar, either directly or indirectly, to use transit billing in the years 1929 and 1930.

I did not have an arrangement with Harper of Spreckels on shortages. I had one with American. For years we have been short in one point and long in the other or short on one lot and long on the other, and when the refiners would make their annual audit those facts were perfectly well known to them.

[fol. 709] I wish to correct my testimony concerning the 4 transactions which I examined on the witness stand this morning and which are contained in Exhibit M-2. These are not typical transactions where I reported a customer other than the ultimate purchaser to Spreckels. Two of them were picked out of the 17 that were reported on here as cases in which the papers produced are incomplete and do not show whether or not Spreckels sugar moved as reported in Q numbers. On all 4 of these bills of lading and papers that we had available for this examination there were several customers involved in the proposition. There was not only an exchange, but also a second resale on a second agent's nar- that was involved.

During the month of April, 1930, American placed us on probation for a period of 1 month. At approximately the close of it I discussed the matter with Stubbs and he said that everything was absolutely satisfactory.

In June, 1930, charges were preferred against Edgar regarding the method of handling American sugar in Indianapolis. I answered each charge fully by letter and about

a week after that I had a discussion with Stubbs and he said, "Well, after all the smoke has blown away in Indianapolis, I guess we will have to give you a clean bill of health." No further complaint was made against Edgar at that time.

[fol. 710] On January 1, 1929, there were 60 Isbell stores. On May 7, 1929, when we notified the refiners that we had submitted to their demand and elected to become a broker, there were 45. From May 8 to May 31 there were 36 stores closed. In June and July the stores were completely closed out.

I had a conversation with Pitman, sales manager of Revere, in December, 1927, regarding the closing of the Revere contract. The arrangement was made in the first part of December, but we did not quite agree on the terms and we were dickering back and forth. Finally, in the latter part of December, Pitman gave me a definite allotment on the deal,—that he would hold it open until the next week and for us to finally try to work out the terms, and said that it had to be closed as of the previous week because they had had some meeting. He asked me to write a letter and pre-date it as of the previous week so that the matter would be closed.

[fol. 711] Percy A. Clayton was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I am president of Clayton, Hugh & Company, wholesale grocers of Memphis, Tennessee.

From December, 1929, to May, 1930, the delivered price of sugar in Memphis was based on the railroad rate of 39¢ whether or not the sugar was shipped into Memphis by barge or rail. Most of the sugar was shipped by barge because Memphis is one of the terminals of the Mississippi Barge Line. After this rate went into effect I protested against the arbitrary charge of 8¢ a hundred over the barge rate.

The wholesalers met in Memphis and protested against the arbitrary charge. They told the refiners that they were

being deprived of the barge rate of 31¢ from New Orleans. All the wholesale grocers of Memphis were represented at that meeting, the results of which were communicated to the refiners in writing.

Petitioner's Exhibit 304 was received in evidence.

In requesting that 10¢ per hundred be added to the rail rate price on withdrawals of less than carload lots, we felt [fol. 712] the refiners were entitled to an additional price for the reason that small withdrawals are expensive. Sugars at Memphis are only distributed to other points in carload quantities, and others that are withdrawn in small lots are transferred to other warehouses so that additional storage charges apply.

By the Court:

Signers of the petition would have avoided withdrawals in less than carload lots, if possible. There were many people other than the signers who would have had to withdraw in less than carload lots.

A number of jobbers protested to the refiners against being charged the all-rail rate since sugar could be brought to Memphis by barge, which was 8¢ lower, and they naturally felt that they should not pay more than the barge rate. They also felt that inasmuch as the barge rate was applicable only to carload shipments from the refinery, the benefit of the barge rate should be confined to carload withdrawals.

If the refiners adhered to their rate and did not heed this request, then the jobbers wanted the refiners to adhere to the practice of allowing less than carload lots withdrawn at the same price that carload lots were. However, since we [fol. 713] asked them to give us a lower rate, we were willing that they charge the rail rate for less than carload lots and entirely willing that for less than carload lots, they charge 10¢ more than the regular price.

If the refiners had acceded to our request, then we would be charged only the barge rate, but on less than carload lots we would be charged the rail rate plus 10¢, and then it would cost us 18¢ more on the withdrawal of less than carload barge shipments. If that had been so the signers of the petition, because of the 18¢ differential, would have tried hard not to withdraw less than carload lots and would have only done

so in an emergency when they would have had to have sugar immediately in small quantities.

Petitioner's Exhibits 305 and 306 were received in evidence.

Cross-examination.

By Mr. Browning:

The barge rate from New Orleans to Memphis was 31¢ and the rail rate 39¢. It takes sugar 12 to 14 days to be shipped by the former and 3 days by the latter. From December 1929 to May 1930 we received 2 or 3 cars from New [fol. 714] Orleans by rail. We also received some barge shipments but did not pay the rail rate. I refused to pay it and deducted the difference from the invoice. I do not remember if the barge shipments were made at my request. We had the option of taking the rail shipment if we chose. I ordered by barge because I wanted the barge rate. The refiner was unwilling at the time to ship all-rail and give the barge rate, but was willing to ship either rail or barge as long as we paid the rail rate.

Defendants' Exhibits U and V were received in evidence.

I do not remember whether I made a further protest between February and May to the refiners individually as the Institute suggested in its reply. There was a change in the practice and we received the barge rate not only on barge shipments but on rail shipments as well.

[fol. 715] Theodore F. Olson was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

Since 1927 I have been the purchasing agent of Urban F. Myers Company, of Chicago, merchandisers of sugar.

In the latter part of 1930 there was a quantity of sugar held at the North Pier in Chicago, apparently the property of Western, but in bags of the Pennsylvania. I bought 5,000

bags of this sugar on January 7, 1931 through Doherty of Lowry & Company at 20¢ under the regular list price of cane. I do not know whom Lowry represented. The sugar was sold "for whom it may concern" and the seller's name was not on the ticket. Lowry thought it was for the account of Western. The sugar was held in Chicago as frozen stock and they wished to move 40,000 bags. In purchasing I bought it "as is." Doherty explained the sugar was in fairly good condition. After I had purchased it and hauled it to my warehouse I found it was in perfect condition.

Petitioner's Exhibit 307 was received in evidence.

I entered an order for another 5,000 bags subject to confirmation and was told by the broker he had wired his New York office which had replied that they could not sell any [fol. 716] more of that sugar under the market price. Doherty explained that the Institute had stopped the sale of the sugar.

In 1928 my company operated a warehouse and a powdered sugar mill. The warehouse burned in the spring of 1929 and for 4 months our offices were temporarily moved into a producer's warehouse. We made arrangements to set up our powdered sugar mills in space rented in that warehouse at a good deal less than the rent we are now paying for the purpose of relieving ourselves of a cartage charge that we now have to pay from the warehouse to our warehouse because we had no private siding.

Mackeion, president of the warehouse, and I called on J. Orson Douglas, of the Domestic Sugar Bureau, and told him what we proposed to do, and asked if there was any objection to moving our mills into the producer's warehouse. Douglas suggested that we should not move into the producer's warehouse. He told us it was not an official ruling of the Domestic Bureau but was his own suggestion. For no other reason than that suggestion we did not go in there.

Cross-examination.

By Mr. Peck:

We were still operating a warehouse but did not do so for [fol. 717] a period of 4 months during the period of reconstruction. We operated 4 powdered sugar mills and have done so continuously, except for the 4-month period men-

tioned. I never spoke to any of the refiners about operating our sugar mill during those 4 months. The only conversation I had was with Douglas. None of the refiners ever attempted to interfere with our operation of the sugar mills.

[fol. 718] FRED HEIMER was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am the St. Louis manager of C. D. Kenney Company who merchandise sugars, teas and coffees. It operates in St. Louis, Missouri, and handles about 300,000 bags of beet and cane sugar a year.

In 1930 the barge rate from New Orleans to St. Louis was 40¢ and the rail rate 50¢. The rail rate from San Francisco to St. Louis was 86¢ and from the Utah-Idaho factory 69¢. The Cities of Springfield, Sedalia and Macon, Missouri, are located 200 miles west and southwest of St. Louis. The actual freight rate from the Utah-Idaho factory to these cities is the same as it is to St. Louis. In 1930, before the refiners put the barge rate application in effect, the freight application charged by the Utah-Idaho Company on shipments from its factory to St. Louis was 50¢, the same as the rail rate from New Orleans.

The beet manufacturer paid 69¢ to get his sugar into St. Louis and obserbed the difference of 19¢. The freight application from the Utah-Idaho's factory on shipments to Macon, Sedalia and Springfield was 67¢. In shipments to these 3 [fol. 719] cities the beet sugar factory absorbed only 2¢ whereas they absorbed 19¢ when they shipped to St. Louis.

I have diverted shipments from the Utah-Idaho Company in order to defeat the higher rate application in the 3 western cities. I did this for the 2 years prior to 1930. I had no formal contract with the Utah-Idaho Company but purchased orally through a broker. I bought the sugar for St. Louis and while it was in transit called the railroad and ordered them to divert the cars for me. Neither the railroad nor anyone else made any objection at the time. The result of the diversion was a saving for me of approximately 15¢ a

bag and without any extra cost to the refiner. I diverted the shipments to defeat the high arbitrary freight application.

A year later the broker from whom I bought the sugar said I had been discovered and that the refinery was going to bill me for these diversions at the freight applications applying to those cities. Utah-Idaho is a member of the Domestic Bureau. A few months later Timson, sales manager of Utah-Idaho Company, told me that I would have to pay for these sugars because the Domestic Bureau had found out about the diversion and said the bill had to be collected. I told him that I thought I was within my rights in diverting the shipments and that I did not intend to make the payments. I told him that regardless of what the Bureau said I still thought I didn't have to pay for them. He said, "Well, you don't want to make it nasty for us; you don't want any trouble?" and I said, "No, sir; I don't."

[fol. 720] We did not divert the shipments thereafter and had to pay the difference of $2,200 when we later adjusted our account with the Utah-Idaho.

The C. & H. brand of sugar is the most popular in St. Louis. About 90% of all cane sugar used is theirs. I am able to sell C. & H. sugar for 5¢ or 10¢ more than some of the lesser known brands. Since 1928 the prices of C. & H. and the lesser known brands are practically uniform so we have had no reason to buy anything but C. & H.

I have purchased sugar from Savannah and in 1930 bought 3,000 or 4,000 bags at the barge rate which was 10¢ less than the rail rate. In December, 1930, I attempted to duplicate the purchase and called James Hutchins & Sons of St. Louis, brokers, and asked if we could get some more on the same conditions. He said there had been a lot of trouble about this and that I could not buy any more because C. & H. had found out about the transaction and raised so much trouble with the Institute that Savannah was afraid to do it again.

For 2 days Godchaux sold a manufacturers' brand of sugar in the southern territory to manufacturers only at 10¢ under the market. I talked about this offer to Pascal, broker of C. & H., because I wanted to buy some myself. [fol. 721] The day that Godchaux offered this brand C. & H. made a similar offer except they offered it at 20¢ under the market instead of 10¢. Manufacturers' brand is a finer grade of sugar than the regular granulated.

At the time Godchaux offered this brand they had a stock on hand but C. & H., who followed a day later, did not and were planning to ship some from the Pacific Coast to meet the situation. I could not buy it because I was told it was only for manufacturers in southern territory and was not for sale at St. Louis.

Later I discussed the matter with Henry Flarsheim, of Seavey & Flarsheim, brokers for C. & H., and asked him why it had been withdrawn so quickly. He said that Moog of Godchaux had called him on the telephone and asked him what he was trying to do in lowering the price 20¢. Flarsheim replied he was going to go them one better. After several conversations Flarsheim said he and Moog agreed to withdraw the offer with the result that it was only in effect for 2 days. Thereafter I never heard of manufacturers' brand of sugar.

As a sugar buyer I have observed operations before and after the Institute. Since the Institute, purchasing has become perfectly mechanical—cut and dried. I can no longer [fol. 722] get any deals or anything else. All I have been is an order clerk. All I have to do is figure how much I can sell and buy accordingly.

Since the Institute I have asked almost all refiners for allowances on direct shipments. I asked Pascal, St. Louis manager of Seavey & Flarsheim, for a 5¢ warehouse allowance, which amount they paid to the public warehouse. I wanted him to ship the cars direct to me and give me the 5¢. The request was made probably 20 to 30 times in the last year or so. Pascal said: "You know I cannot do that. That is against the Code of Ethics.".

Cross-examination.

By Mr. Higgins:

I have been manager for Kenney in St. Louis for 5 years and have been purchasing all kinds of sugar for them since May 1927. I have been connected with the sugar business ever since 1916.

I dealt with Great Western, Holly, Utah-Idaho and others. I knew that sales of beet sugar during all the time I was in the sugar business were on a delivered price basis

and were based on the price of refined cane plus the cane refiners' freight application less a differential of 20¢.

I dealt through Wilkerson, St. Louis manager of Mein-
[fol. 723] rath Brokerage Company, when I diverted Utah-Idaho sugar for the purpose of defeating their freight application. My relations with Meinrath began in the middle of 1928 and have continued until the present. Most of the purchases were beet sugar. At the time of the purchase of this sugar, Utah-Idaho sent me a contract which I did not sign. I had not been signing before the Institute and did not do so becauset here was a clause prohibiting just this thing. I was told that if I did not sign the contract the railroad would not be permitted to divulge the final destination of the sugar under a clause in the contract. I had no oral contract or understanding with anyone representing Meinrath or Utah-Idaho Company that I would be allowed to defeat in this way the seller's application. I understood that when they sent this form of contract their offer was to sell the sugar to a destination outside of St. Louis and that the freight application of Utah-Idaho to that destination was to be the contract price, but I did not think they were legally entitled to it. The practice related only to the cars about which I have just testified. None were diverted before or since.

I did not pay the $2,200 because I thought a dishonorable
[fol. 724] thing had been done. I still think I have a legal right to divert. I knew that the company was absorbing freight in St. Louis and points out of St. Louis. I did not want to make them absorb any more freight charges but they would have to put the sugar in the different warehouses for me and pay a 5¢ storage so the cost to them would have been practically the same. The beet companies were absorbing more at St. Louis than at interior points but Timson told me he was perfectly willing to sell me the sugars f. o. b. St. Louis and that if the Domestic Bureau had not made him he would not have tried to collect the balance of the bill.

I dealt with Wilkerson in connection with the withdrawal of sugar from the Broadway-Kass warehouse during 1928. I received no concessions on withdrawals from this warehouse. I made an arrangement to withdraw the sugar in small amounts from time to time and have them delay the reports of the withdrawals until there had been an accu-

mulation and perhaps a change in market price. The arrangement continued for about a year until the Institute cut the warehouse off the list. Chinal told Meyer, head of this warehouse, and me that the Institute had blacklisted it. [fol. 725] By this method of delayed billing we expected to receive the benefit of a reduction in price if there was one but there were very few that year. Every time they were made we had bought up enough sugar ahead so that there was no benefit to us. I do not think we derived any benefit except in not having to pay the bills quite on time. The arrangement would have been profitable if there had been any reduction in price.

I do not know that my arrangement with the Broadway-Kass warehouse was a scheme to defraud the refineries. I thought it was perfectly honest and still think so. I think it is honest to deal with a warehouseman on the basis where he falsifies his reports to the refiner if he cares to do that. I did not ask him to do it. He did so willingly. I had no arrangements with any broker or any representative of the refiner regarding the Broadway-Kass arrangement.

I have tried to get concessions since the Institute was formed but have not been able to except on one transaction when I bought Savannah at 10¢ less than the list price. Ninety per cent of our cane sugar was purchased from C. & H. Both before and after the Institute I paid their publicly announced list price.

[fol. 726] The Savannah sugar which I purchased in 1930 had been shipped by barge from New Orleans to St. Louis. I received the concession by purchasing at the barge instead of the rail rate. At that time no refiner was selling in St. Louis on the barge rate unless shipments were actually made f. o. b. New Orleans and shipped up the river by barge. The sugars belonged to Savannah until purchased by me in St. Louis. I had a written contract with them for that purpose but it did not state our arrangement. It was a private proposition made by one of the Savannah officials and myself. The written contract was different from the oral understanding. At the time we could buy sugars f. o. b. New Orleans and have them shipped by barge and pay our own freight rate. There was never a time since I have done business in St. Louis when I could not buy f. o. b. the refinery, ship by barge and obtain the full benefit of the barge rate. The difference now is that I can

buy in St. Louis at the barge rate and have the sugars moved by rail. At the time I obtained this concession from Savannah no one was applying the barge rate. The refiners were all charging the rail rate.

Redirect examination.

By Mr. Rice:

The official of Savannah from whom I obtained the barge [fol. 727] rate was Benny Oxnard. I told him despite the fact that C. & H. was in demand in St. Louis and Savannah was not, we could move quite a bit of Savannah sugar for him if he would make a concession. He said he wanted the plan worked out this way because it could not be discovered as readily.

We have had the barge rate on rail shipments for only the past year.

[fol. 728] YANCEY ALTSHELER was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I am secretary of Altsheler & Company, wholesale grocers in Louisville, Kentucky. For a number of years our company has bought sugar from the defendants.

The Mississippi and Ohio Rivers are the routes available for water transportation. If shipments are made by the Federal Barge Line they travel by the Warrior River to Memphis or Cairo and then by rail to Louisville. If shipments are by all-barge they are carried by the American Barge Line from New Orleans. The American Barge Line's rate on January 1, 1930, was 38¢. It normally takes sugar 3 weeks by the all-water route and 2 weeks by the barge-and-rail route.

In January, 1930, the prepaid rate used by the refiners over the rail-and-barge line was 45.9¢. At the same time the actual rail rate from New Orleans was 54¢. On December 14, 1929, the various refiners announced they would sell sugar in Louisville only at a prepaid rate of 52.6¢. The all-rail rate from New York was 56.5¢. Between De-

cember, 1929, and June, 1930, we paid the 52.6¢ rate regardless of the mode of transportation which was used.

We endeavored to buy f. o. b. refinery during the period [fol. 729] when the all-rail rate was in effect but we had no success until June, 1930, when the refiners announced they would again sell at the barge basis.

Before June we had the choice of transportation but would have to pay the same freight rate. After June the Federal Barge rate applied and was used as the basis for computing the delivered price to Louisville even though the sugar was received by rail.

Most of the sugar is moved to Louisville by rail because a good percentage of it is sold by New York refiners. I cannot say what percentage moved from New Orleans though I know that some of the refiners there availed themselves of all-barge transportation to Louisville. According to the information obtained by the brokers in Louisville in June, 1930, and conveyed to me, it was announced that barge rates would apply.

We were able to buy 2 cars of sugar from Henderson after June, 1930, and obtain the advantage of the 38¢ all-barge rate to Louisville. Afterwards Henderson would not sell any more sugar on that basis, saying it was meant to be the Federal Barge rate and not the all-barge rate.

Until May, 1931, we were unable to make any saving by having sugar shipped over the water routes except for these 2 cars.

[fol. 730] I looked up the rates on movements of sugars to Bloomington, Illinois, and Davenport, Iowa. The refiners' rate basis to Louisville in January, 1930, was 52.6. The actual rate from New York was 56.5 and the actual rate from New Orleans was 54. At the same time the refiners' prepaid basis to Bloomington, Illinois, which is 200 miles from Louisville, was 44¢. The actual rail rate from New York to Bloomington was 62¢ and the actual rail rate from New Orleans 54¢. At Davenport, Iowa, the refiners' prepaid basis was 50¢. The actual rail rate from New York was 66¢ and the actual rail rate from New Orleans was 60¢.

I do not know if there was a barge and rail rate to Davenport. The point that impressed me was that the refiners were charging less for deliveries of sugar into Bloomington, Illinois, and Davenport, Iowa, than into Louisville and the rail rate was higher. In cooperation with some of the other jobbers, I protested to the Louisville Board of Trade

about the situation. We then protested to the Federal Trade Commission because of the refiners' discrimination.

It was not a question of Bloomington or Davenport underselling Louisville. The Bloomington jobbers competed [fol. 731] with Louisville jobbers to a limited extent in Indiana territory.

Cross-examination.

By Mr. Browning:

On rail shipments the refiners have always had the same freight application whether the sugar came from New York, Philadelphia, New Orleans or Savannah, though there have been times previous to 1929 when we were able to get sugar from New Orleans and enjoy the benefit of the all-barge rate. In the normal situation before June, 1929, the freight application applied to an all-rail rate direct from refiner or to a delivery from consignment and the barge rate applied to a barge shipment. Before 1929 we paid only the barge-and-rail rate irrespective of the route over which the sugar moved, except that prior to this time we had made use of the all-water transportation from New Orleans and had the benefit of the lower rate by all-water transportation. As early as 1929 the freight application at Louisville was broken down to the barge-and-rail rate irrespective of the route used. At a given time all refiners had the same terms on transportation to Louisville except when we were able to use the all-barge rate from New Orleans.

No refiner could sell in the market unless his freight ap- [fol. 732] plication was as low or equal to that of the lowest refiner.

Prior to 1928 the freight application was slightly lower than the lowest all-rail rate to Louisville and since 1928 it has been lower than the lowest all-rail rate. At no time has the freight application for all-rail shipments been higher than the lowest all-rail rate from any refining point. The prepaid rail rate was 52.6¢ and was based on the rail rate from Savannah to Louisville.

After June 1, 1930, I tried to buy sugar f.o.b. New Orleans from Henderson without success. I asked Halloway of Ramsaebott, Halloway & Co., American's broker, and he said it couldn't be done.

Shipments by the American Barge Line, a local service,

usually took 3 weeks although there have been times when it took as long as 60 days.

I only investigated the rail rates from New York and New Orleans to Bloomington. I knew that Bloomington was beyond Louisville so that the Savannah rate would be higher than the rate to Louisville. I saw in one of the sugar announcements that the refiners were making that rate to Bloomington. I have no idea why it was made and did not know it was a New Orleans barge rate to Bloomington. It would be extremely logical for that figure to repre- [fol. 733] sent the New Orleans barge rate but I was complaining because they were charging Louisville the Savannah rail rate and were giving Bloomington some other rate.

I did not investigate to see how long Bloomington had the prepaid 44¢ rate and made no inquiry as to the history of the freight application to Davenport. I did not know if these rates had always been in effect. The thing that interested me was that they had higher rail rates in Louisville and these 2 cities were getting a lower prepaid rate and were depriving Louisville of the advantage of the barge rate.

The situation changed in June, 1930, and Louisville went back to the Federal Barge rate. We felt that Louisville should enjoy whatever advantages its natural location would give it on the waterway, not only for sugar, but for any other commodity. Our contention was that if we wanted to shop by an all-barge line, we should be allowed to do so.

I did not ascertain that Bloomington, Illinois, was further from New Orleans than Louisville but I concluded that from general knowledge. Bloomington is in Eastern Illinois near the Indiana boundary but is on no river. Davenport is on the Mississippi River.

Some sugar is moved through the Great Lakes to Chicago and then shipped by rail.

We told the Federal Trade Commission that sugar re- [fol. 734] finers had deprived Louisville of the advantages of the water transportation. They gave us part of the advantage by finally granting to us the Federal Barge rate but they did not let us have the all-barge rate. The protest was made to the Federal Trade Commission January 6, 1930, at which time the rate was 52.6. At that time we were not getting the rail-and-barge rate. It was not granted until several months later. We asked for barge rates

only on barge shipments and rail rates on rail shipments. Five months later the freight application was reduced to the barge-and-rail rate and made applicable to all shipments, including all-rail movements and deliveries from consignment.

I do not know what happened to the Bloomington rate since that time. My interest in Bloomington ceased after we had used it as a method of protest of the treatment of Louisville.

On June 19, 1931, an arbitrary — of 40¢ for Louisville was announced by all refiners. It has been in effect at all times since.

[fol. 735] JAMES E. WILSON was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I am vice-president of Larkin, Inc., Buffalo, New York, and have charge of the warehousing business conducted by them. It does a mail order, retail, wholesale, gasoline and warehouse business and owns about 100 stores in and near Buffalo and about 40 in Illinois. We have 3 branches of the mail order business, in Philadelphia, Peoria and Buffalo, and have a wholesale house in Buffalo. Larkin is one of the largest mail order houses of its kind and has been in business since 1878.

We have about 1,000,000 square feet which we devote to public warehousing in Buffalo. Our warehouse is built of steel and concrete, is fireproof and has a Fuller sprinkler of the latest construction. We have concrete floors overlaid with hardwood, elevators and enjoy the lowest insurance rates of any warehouse in Buffalo.

American, National, Edgar, Franklin and Spreckels stored sugar in our warehouse prior to 1929. We store practically everything in our warehouse and have occupied [fol. 736] as much as 800,000 square feet at a time. None of our storage customers have complained as to our storage facilities, our service or the manner in which we kept our records.

Our company sells some sugar. In our buildings in Buffalo we have 65 acres of floor space. The department oper-

ating the chain stores is in what is known as Unit 2 which is on Seneca Street. At the present time all storing is done on the first floor. This particular warehouse is served by the New York Central and the sugars there that belonged to Larkin were brought in, unloaded on the first floor and kept there until distributed to the stores with other merchandise.

The sugar stored for other people was stored, in practically all cases, across the street in a building one block east. There was no connection whatever between the 2 accounts. They were entirely segregated and different men handled them. The warehouse records are kept entirely separate from the records of the other divisions of our business and the warehouse had separate employees. I do not know exactly where the stocks of stores were kept because that is a separate organization with which I am not concerned, but I imagine they were kept in the store office which was in another building.

[fol. 737] The majority of other purchasers of sugar drew from consignment stocks in our warehouse. The withdrawals were made from the store stocks on the authority of the brokers. They or the refiners were the only ones who could authorize a withdrawal. We never withdrew any stocks for the use of Larkin without the authorization from the brokers or the refiners. We reported withdrawals from stocks on the same day the order was given.

We never held up a report in order to take an advantage of decline in price, nor did we ever date back the day. We would not know anything about the sugar which was bought by the buyer of Larkin for the grocery department until the broker or refiner gave us the release. We did not get any word from Larkin itself as to the withdrawal. We never collected any storage charge on sugar not actually stored. Our warehouse was never used in any way to give or arrange with Larkin or any other company a rebate or concession.

I should like to read a paragraph from the minutes of the Enforcement Committee of the Institute, dated June 3, 1929, entitled "Larkin Warehouse & Storage Co., Buffalo, N. Y."

"It is generally understood that this company is owned or affiliated with the chain store of Larkin & Co. There being no evidence of divorcing of interests before the Committee, the Committee were of the opinion that this ware-

house must be presumed to be a customers' warehouse within the resolution of May 2nd."

We stopped storing sugar for the refiners in the spring of 1929. About the time the stocks were withdrawn we had conversations with brokers and other representatives of the refiners concerning the continuance of the business. I spoke to the brokers in Buffalo first and they informed me there was an organization known as the Institute. It was [fol. 738] understood that it would not affect our warehouse, that there were other practices going on which did not occur at our warehouse, but later C. J. Irwin, National's broker, told me the Institute had decided refiners could not store sugar at our warehouse. I also spoke with Duane of Harrington & Duane, brokers for American, who received similar instructions a few days after National. Then Edgar said they did not figure our house should be eliminated and began to store sugar after the others had withdrawn.

Neither of these brokers had any complaint as to the way we ran our warehouse. They thought it was a misunderstanding.

I was advised to go to New York where I saw Bruyn of National. He told me to talk with Judge Ballou and that possibly I could get him to bring the subject up again. He made an appointment for me to see the Judge who told me that they had made the decision and the case would not be reopened, that we were a warehouse and were in the sugar business and that was all there was to it.

I tried to explain that it was not for the interest of Larkin—I would be perfectly willing to give a bond that any sugar stored there would not be released to Larkin—but it was for other wholesale grocers in Buffalo who used [fol. 739] our warehouse for storing sugars. I explained that Larkin was willing to buy its own sugar direct from the refiner rather than store it in its own warehouse because if the refiners shipped to our warehouse then the sugar would have to be taken up, stored and brought down again on the elevator and would cost us more than if we purchased it direct. Judge Ballou said there had been some very bad practices going on; it was just a ruling, and the innocent had to suffer with the guilty and I expressed the opinion that we be investigated but he would not listen to me at all and said I might as well forget it. He did not complain of the conduct of our company. The matter came up again when we solicited business in Buffalo and the

brokers said there was a new man in charge of the Institute and I came back again and had an appointment and saw Taylor but I did not get any further than I did before. The sugar space is still idle.

Cross-examination.

By Mr. Peck:

There is but one company, Larkin, which does a mail order business and sells through chain stores. The warehouse operates under a trade name known as "The Larkin Terminal Warehouse" and is unincorporated.

Larkin pays the warehouse employees by a separate account from funds derived from storing commodities.

[fol. 740] I do not think the question of ownership of the warehouse came up during my conversation with Judge Ballou and Taylor. Brokers and refiners advised me that the Institute had ruled that sugar could not be stored in the Larkin warehouse because it was engaged in both the sugar and chain store business.

The sugar which we stored for refiners was put in the same building in which we stored our sugars. If a car came in on the New York Central to the street floor it would be elevated 6 floors, where sugar was stored for outside concerns. It would not be left on the first floor. Larkin kept its sugar on the first floor. It did not withdraw sugar from the stocks consigned with it. The brokers might have given me an order to deliver 100 or 200 bags to Larkin but Larkin would not have that transaction with me. Larkin got some of its sugar from stocks it stored for the refiners. Our warehouse department loaded the sugar on trucks, put it on the elevaor and delivered it to the first floor. All this was done by employees of Larkin.

Larkin was not privileged to draw from the consigned stocks and then report it to the broker. The only way we would be permitted to release sugar was on order from the man who owned it. We always received a form made out, either from the broker or the refiner, as to the disposition of the sugar.

[fol. 741] Edwin R. Meyer was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I represent and am a Director on the Board of about 25 wholesale grocery companies in Illinois, Missouri and Arkansas. I have in St. Louis an office which is managed for the convenience of those houses. We do some buying from that office, handle the details and direct the policies. I buy from 250,000 to 500,000 bags of beet and cane sugar a year and handle $18,000,000 to $20,000,000 worth of commodities. Prior to the formation of the Institute, a great deal of our cane sugar was bought from American and the beet from Holly, Amalgamated and Utah-Idaho.

The purchases from American were on varying terms, depending on the best deal I could make. I obtained from them concessions of from 5¢ to 10¢ a bag.

Petitioner's Exhibit 308 was received in evidence.

I had conversations with practically all the refiners selling sugar in the St. Louis territory regarding the announcement in Exhibit 308. When I received it I tried to make some other deal with the other refiners. I called up Brownlee. [fol. 742] He told me that the Institute had been formed, that he was sorry but they had to discontinue all arrangements that he had with me and there was no chance to do anything except what they publicly announced. In December, 1927, I had a long distance telephone conversation with Brownlee and told him I had heard a rumor that the Institute was being formed, that I had bought sugar from American for 7 or 8 years and wanted to know if there was a possibility of getting in under the wire. He said there was no chance of doing anything. I told him I understood that all these special concessions and allowances would be withdrawn and asked him if it was not possible that I could make a deal for the year 1928 on the same basis as I worked with him in 1927 and he told me I could not.

After January, 1928, we purchased on publicly announced terms of all refiners. I paid the full price for a year and 4 or 5 months and during that time made frequent efforts to obtain allowances or concessions from the various refiners. I was told they could do nothing; that the Institute had been formed and that there was no possibility of doing anything except on their regularly announced terms.

[fol. 743] A year and a half later we obtained a concession from Oxnard of Savannah. He tried to sell us sugar and I told him we were not interested in Savannah's sugar as it did not sell well in St. Louis and that if he wanted any of our business he would have to give us a concession. About a week later I heard from his broker, Hutchinson, who told me that he had obtained a rebate plan for us and wanted some sugar business, which we gave to him. The rebate was 10¢ a bag under their price.

There was plenty of discussion of the Institute on the occasion but I cannot recall the conversation except that it had to be kept quiet because if the Institute heard of it there would be trouble between it and Savannah.

The rebate was in the form of a check which Savannah sent direct to me. The saving was passed on to the 25 wholesale grocers. The arrangement continued 3 months. Hutchinson told me there had been a meeting held in Chicago which resulted in strengthening the Institute's position materially and there would be no further rebates.

The correspondence which you hand me is between American at New Orleans and New York and my office in St. Louis. It refers to a purchase on March 6, 1929 of 1,800 bags of sugar entered through Hosmer, Perry & Watson, [fol. 744] brokers for American, on which contract I had given specifications for shipment and which American refused to honor. The 1,800 bags of sugar were supposed to be delivered to certain concerns in New Orleans, one of them being the International Rice & Trading Corporation. I had furnished the specifications to Hosmer, Perry & Watson verbally. Afterwards I received a wire from American.

Petitioner's Exhibit 309 was received in evidence.

I requested the broker to make delivery of 1,200 bags of sugar on the contract I had with American to the International Rice Corporation. Thereafter they said they would not honor it. I wanted to know why and they said there had been a ruling of the Institute that said they could not make a shipment to non-guaranty territory of sugar sold on a guaranty contract. International Rice & Trading Corporation, which was in guaranty territory, was going to ship 1,200 bags into non-guaranty territory. I then wired M. B. Murphy, asking that delivery be made to International, confirming my oral request and asking delivery f. o. b. the refinery.

Prior to this time we had signed only one contract and American had made deliveries wherever we requested re-
[fol. 745] gardless of whether it was in guaranty or non-guaranty territory.

Guaranty territory is territory in which the refiners guarantee against a decline in the market for a period of 30 or 42 days. According to the ruling the refiners would not ship, regardless of what the market was doing.

During 1928 the barge terms did not carry the guaranty clause and payment was 14 days after date of shipment. At the time a contract was made we specified if we wanted shipment by barge or rail. At any time during the existence of a contract we could take advantage of the barge rate, specify shipments by barge and receive the benefit of such an arrangement. In the latter part of 1928 refiners requested us to make 2 separate contracts and specify whether we wanted rail or barge shipments.

It was difficult to operate our business under those terms because I bought sugar for 30 or 35 points and when I made a contract did not know where that sugar was to be shipped or whether the purchaser wanted it shipped by barge or rail. The Arkansas territory where we operate was non-guaranty territory at that time. We had to specify that the sugar was going into non-guaranty territory and that
[fol. 746] made it very hard for us to handle our business.

The situation did not continue long because we were able to find several refiners who met our terms. The first one was C. & H., who in July, 1929, made one contract and permitted us to sell either rail or barge. The contract provided on its face "shipment by rail with a guarantee". I made the contract with Milton Flarsheim, broker for C. & H. in St. Louis. He said he was going to give me a contract which would require rail shipment, but in strict confidence told me that they would honor shipping instructions by barge.

Prior to the formation of the Institute I studied the raw sugar market to keep posted upon its probable reaction on the refined market. If I felt strength in the raw market would continue I naturally purchased more refined sugar than I would if I felt it was simply a temporary movement.

After the formation of the Institute I continued the study of raw sugar for a period of 5 or 8 months. I was not guided by the movement of raw sugars because I felt

the spread between raws and refined did not remain as constant as they did prior to the formation of the Institute. I noticed an increase in the margin between them.

[fol. 747] Cross-examination.

By Mr. Higgins:

Prior to the Institute I had a continuous arrangement with American for a straight cash concession of 5¢ per bag and at times a guaranty against a price decline, which was worth 5¢ a bag. The straight concession was paid by checks and not deducted from the announced price.

Deliveries were not made to a central warehouse but were merely individual deliveries to 25 or 35 wholesale houses.

There were 10 points difference between the barge and rail rate application into St. Louis in 1929 and ever since. The purchaser f. o. b. New Orleans refinery could ship by barge at the barge rate and by rail at the rail rate provided he specified at the time he made the contract. If I took delivery out of consignment to St. Louis, Mounds or Cario, Illinois, the rail rate was 10¢ higher than the barge, so that if the refiner gave me the privilege of buying out of consignment at the barge rate it was equivalent to a 10¢ concession below his regular price.

At the time this arrangement was made with Hutchinson, Savannah was initiating a sales campaign in our territory and its sugar was new and he wanted our business as a large [fol. 748] purchaser of sugar. It may be possible that he said that, although the prevailing selling terms of the refiners in that market were rail for rail or barge for barge and that rail terms were applicable to deliveries ex-consignment, he would permit me to take my deliveries ex-consignment and apply the barge rate, which was 10¢ lower than the rail rate. The arrangement I had continued for approximately 3 months and then Hutchinson told me he could no longer give me that concession because there had been a complaint about it.

The sugar which we took had come up by barge and was stored at the barge warehouse. It was arriving in St. Louis all the time. All of the sugar was not in storage at the time I purchased. The transaction was profitable because I obtained spot delivery instead of having to wait 2 or 3 weeks for barge delivery.

I have telephoned my secretary and find now that my memory served me falsely in regard to that transaction. There are 2 contracts, one of March 7 and one of April 4. The sugars were brought from Savannah on the prevailing basis, shipped out of Cairo, Memphis and St. Louis, consignment points, by rail and the barge rate was charged. I received the barge rate for shipments out of consignment.

[fol. 749] Redirect examination.

By Mr. Rice:

The privilege was worth approximately 10¢ a bag. I had received a 10¢ concession.

[fol. 750] C. A. HUMPHREY was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I do a general brokerage business in Evansville, Indiana, and am the broker for American. I have been in business 20 years.

Van Buren, an employee of the Institute, came to my office in October, 1930, and said he was checking my stocks of American in the Evansville warehouse. He returned again in December and called a meeting of Evansville brokers for the purpose of selecting warehouses for the storage of sugar which would be satisfactory to jobbers and brokers. I told him that I was not particularly interested but agreed to meet that afternoon at 4:00 o'clock.

The purpose of the meeting was to select warehouses. A plan had been adopted by the Institute in Chicago which provided that brokers should indicate where they wanted sugars consigned and a similar plan was proposed for Evansville.

There were present at the meeting Kriekhaus, representing Godchaux, Amos, representing C. & H., Parker, representing Colonial and Savannah, and Block, representing Henderson.

Prior to the meeting Van Buren said the Institute would [fol. 751] put a warehouse in Evansville if the brokers could

not decide on one that was satisfactory. That affected me only to the extent that I wanted to know where American sugar was to be stored.

C. L. Kriekhaus acted as secretary of the meeting. Van Buren asked if we would make any recommendations of any warehouse. I said I would be glad to recommend any that would be satisfactory to him. Parker said he was interested in the Sterling Warehouse. I did not state that I had an interest in the Evansville Warehouse and the fact was not brought out.

It was an undisputed fact in Evansville that there were only 2 houses for storing sugar. Parker receives the majority of the sugar business and I get the balance. Parker said he had a $5,000 interest in Sterling and Van Buren said that eliminated Sterling. I was willing for them to have whatever warehouse they wanted. Van Buren suggested we vote on the various warehouses and he named the Lex Terminal, known as the Lex Warehouse, and the Brokers Warehouse. He also named the Evansville Warehouse and the Sterling Warehouse and we voted informally on those 4.

Van Buren made it clear that he wanted 100% co-operation [fol. 752] of the brokers so there would be no further reports of criticism on the Evansville situation. Before we took a vote I made the statement that I had no stock interest in the Evansville Warehouse. I originally organized it.

We were unable to reach an agreement and when that became apparent Van Buren told us he had to go to New Orleans and wanted us to have another meeting and reach an agreement so that after the next meeting, which was to be held immediately after his return, he would be able to make his recommendation to the Institute.

On December 10 a second meeting was held. In the meantime Amos died. The 4 of us agreed to ask the Institute to store sugars in Sterling, Brokers, Lex Terminal and Evansville warehouses, and Kriekhaus, the acting secretary, forwarded that request to the Institute. I heard nothing from Van Buren and never saw him after that.

American withdrew their stocks, which they had a right to do, and put them in the Brokers Warehouse and they are still there.

Cross-examination.

By Mr. Peck:

At the first meeting Van Buren made the point that a broker or jobber might have an interest in the warehouse and this he did not want. We voted informally on the question of warehouses in which brokers had an interest and [fol. 753] those in which they did not. We voted that brokers had no interest in the Lex Terminal and Brokers warehouses. Four voted against Sterling, Parker alone voting for it. Amos, Parker and I voted for the Evansville warehouse and Block and Kriekhaus voted against it.

Defendants' Exhibit N-1 was received in evidence.

I organized the Evansville warehouse in 1917 but never conducted its business. I was the owner until July 1, 1929. I had an office in the building in which I was interested but of which I was not the entire owner. The owner is the Lafayette and Indiana Realty Company, organized in 1927. I was the president and principal owner of that company.

Two grocery companies, the Creecy Corporation and the A. & P.'s trucking department and ordering department were also tenants. Between the Evansville Warehouse Company, which occupies more than ¼ of the building, and the grocery companies, there was nothing except a brick wall. They were back to back with a fire-door between them. The fire-door locks on both sides but could be opened if both parties agreed to do so.

I transferred the stock of the Evansville Warehouse, [fol. 754] which I owned entirely, to Miss Ada Holsgraf, who had been running it since 1912 and she in turn divided it with Miss Kempf and Floyd. In return for my stock she turned over to me securities of different companies worth $2,700 in lieu of cash. It was a friendly agreement which I used as a means of divorcing the warehouse business from the brokerage business.

If a customer orders 50 bags of sugar, my stenographer makes out an order on the warehouse to deliver 50 bags to him. The sugar is picked up by the buyer's truckman. The warehouseman prepared 3 delivery tickets, one of which he keeps, one of which goes to the truckman and one of which he delivers to me. After the sugar has been delivered to the

buyer and I have received the delivery ticket from the warehouseman, I make out the D from C which I send to the refiner.

I do not bunch the warehouse receipts and make one D from C to cover several of them.

Redirect examination.

By Mr. Fly:

It was never the practice of our warehouse to permit the withdrawal of sugars without an order from me by telephone or in writing.

[fol. 755] CLINT HOLLADY was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I am president of Houston Central Warehouse Company at Houston, Texas: Its sole business is to store merchandise. It owns a brick and concrete 8-story building which was built in 1928, has an automatic sprinkler and a low insurance rate. Exhibit 310 is a picture of our warehouse. The low building to the right is a wholesale grocery house, the Schuhmacher Company. The platform along the front of the building is continuous as between the two. Otherwise we were separate buildings. Between the 2 buildings are 4 iron roller doors which are locked on the warehouse side. There is no passage between them other than along the platform.

Petitioner's Exhibit 310 was received in evidence.

In 1928 and the early part of 1929 we handled sugar accounts of Imperial, Godchaux, American and Henderson. It was our practice to report the withdrawals of sugar the day they were actually made. Any deviation from that practice was brought about upon the instructions of refiners or their brokers.

[fol. 756] In 1928, when I was president of the Houston Warehouse Company, we consolidated with the Schuhmacher Properties, a corporation which had erected the

grocery building next door to us, increased the capital stock of the Houston Warehouse and changed its name to the Houston Central Warehouse Company. H. C. Schuhmacher and C. A. Perlitz reorganized the company as the Houston Central Warehouse Company and increased the stock. At the time they purchased a considerable amount of stock, which enabled us to add working capital. Certain stockholders of the grocery company also owned stock in the Warehouse Company.

There was no mingling of stocks of the refiners with the stocks of any of the customers or the Schuhmacher Grocery Company which was treated the same as other customers of the refiners who drew on these stocks. The Warehouse Company and Grocery Company had separate employees.

Our company did not give rebates or concessions to any purchaser of sugar. We stored a number of other commodities in the grocery line and probably did the largest merchandising business in the City of Houston. We had no complaints from the refiners, except minor ones, as to the methods used by the warehouse.

[fol. 757] The bulk of the sugar was withdrawn from our warehouse in July 1929.

Mr. Fly: I read from the minutes of the Enforcement Committee, August 13, 1929, headed "Houston Central Warehouse."

"A letter was read from Mr. Clint Hollady, president of the Houston Central Warehouse, Houston, Texas, regarding Institute members discontinuing the use of that warehouse and requesting an opportunity for a hearing before the Enforcement Committee regarding same. It was recommended that in answering this letter the Executive Secretary should include a copy of the resolution of May 2nd concerning affiliation between warehouse and customer. Further it was suggested that no attempt be made to justify the action of the Institute but that a statement be made that where an affiliation was shown between a customer and a warehouse it should be considered sufficient reason to discontinue the use of the warehouse."

We were reinstated August 30, 1930, and are storing the defendants' sugars today.

Petitioner's Exhibit 311 was received in evidence.

Cross-examination.

By Mr. Peck:

There was a relationship by reason of stock ownership between the Schuhmacher Company and the Houston Central Warehouse during 1929. When we reorganized the Warehouse Company, Schuhmacher and Perlitz bought $40,000 of the $50,000 capital stock in the Houston Central Warehouse. Schuhmacher is president of the Schuhmacher Company and the Schuhmacher Properties. Perlitz is vice-president of the Schuhmacher Company and is interested in the Schuhmacher Properties. They are the 2 leading figures in the Schuhmacher Company, a wholesale grocery company which has several branches located in towns around Houston.

I was in charge of the warehouse. The 2 companies are served by the same platform. Schuhmacher drew its sugar in carload and less than carload lots. The carload deliveries were for their out-of-town branches and these Houston [fol. 758] loaded on the cars. Local deliveries were l. c. l. These were hauled to the platform. Schuhmacher put the sugar into its place of business and returned our trucks to the platform.

The Schuhmacher Company stored sugar on its own premises but Houston did not store any for them unless there was a transfer of a particular lot of sugar, in which case it was duly notified by the refiner or broker and if they ordered a transfer of 1,200 or 1,800 sacks of sugar, we made a new entry in our records and reported to the refiner the completion of the contract.

Refiners paid storage to a certain date and Schuhmacher usually drew that sugar out prior to the expiration of such date. The refiners expected the Grocery Company to remove it within that time and then the sugars became theirs.

The statement in my letter of September 6 to the Institute that "The Schuhmacher Company does not have any stock nor do we have any stock in their business" is not a complete statement of the relationship. If I had gone on to tell the whole story I would have said the principal owners of Schuhmacher were also the principal owners of our company. In the correspondence we assumed there was

absolutely no connection from a managerial standpoint be-
[fol. 759] cause Schuhmacher and Perlitz relied on us to run the warehouse business. That is the attitude I assumed in all of my dealings with both the Institute and Imperial and all of the other warehouse accounts that we had.

I did not know the thing the Institute was interested in was the relationship between our company and Schuhmacher. I thought it was interested in the relationship between a sugar buyer and the warehouse in so far as the buyer controlled the warehouse.

In August, 1930, the sugar was again stored with us. At the present time we are storing for Imperial, American, Henderson, Great Western, Holly and C. and H. and serve about twice as many accounts as we had before.

We deliver to Schuhmacher any brand they call for. I couldn't say they used all these sugars to some extent, but probably they did. I am quite sure Schuhmacher bought sugar from the refiners on direct shipments. They still do because we do not handle all the sugar they use.

During 1929 Schuhmacher ordered sugar from the refiners, shipped it to the warehouse and then had it shipped out right away. In such circumstances the cars were partially unloaded at least.

When I say partially unloaded, I mean that if late in the afternoon we received an order to ship a car of sugar, it would be impossible to load it out and on the authority of the broker or refiner we would open the car door and take out 150 or 200 sacks to check to see that the car was all there.

I know of no evidence that they were not even partially unloaded but I can't say that that didn't take place. In such instances the warehouse charged storage just the same
[fol. 760] as if the car had been completely unloaded and loaded. I cannot say that in some cases the cars were unloaded right into the Schuhmacher premises on the other side of the platform and I cannot say that it was not done.

Berry-Harde Company, of Houston, are brokers for Imperial of Sugarland, Texas, which is about 18 miles from Houston.

Defendants' Exhibit O-1 was received in evidence.

I am unable to say that Exhibit O-1 refreshes my recollection as to whether cars for Schuhmacher were consigned

to our warehouse and immediately unloaded and put into the Schuhmacher premises in Houston for the reason that a number of these transactions occurred when I was not present. This order contemplated a shipment through Houston to some other destination for the reason that they requested certain sugars to be loaded in each end of the car and in that particular instance it may have been unloaded on the Schuhmacher platform and they loaded some other sugar or some other merchandise. The chances are the car came in consigned to ourselves and was delivered to Schuhmacher without passing through our warehouse.

[fol. 761] When cars came from the refinery to our platform and were partially unloaded before going to branches of the Schuhmacher Company in other towns, we checked them, took out some bags which we hauled away in our trucks and reloaded after the entry was made. Normally the transaction would take 3 hours. In such cases a month's storage would be charged on the whole car with the knowledge of the broker or refiner.

Defendants' Exhibit P-1 was received in evidence.

Exhibit P-1 was a shipment to Houston Central Warehouse, Texas, final destination Schuhmacher Company, Eagle Lake, Texas. Eagle Lake is in an opposite direction from Sugarland than Houston so that a shipment by rail to Houston first would result in a back haul because the sugar would have to return to Sugarland again and then be shipped to Eagle Lake.

Defendants' Exhibit Q-1 was received in evidence.

Patterson, an investigator from the Institute, came to Houston in the first part of 1929 to investigate our ware-

[fol. 762] house. After the stock was transferred we wanted to store sugar again and in the middle of 1930 Van Buren, another Institute investigator, came to Houston. He made a second trip and asked us about the arrangements for taking over the stock of Schuhmacher and Perlitz. I refused to give him any such information.

Redirect examination.

By Mr. Fly:

I did not handle any sugars in the manner indicated in Exhibits Q-1, P-1 and Q-1 without the consent of the re-

finers. It was known how we handled these cars if we did handle them. We were not charging any storage which they were not aware of. They made no complaints as to our method in these or other transactions.

Recross-examination.

By Mr. Peck:

Generally we did not delay reporting withdrawals. The only time that we did hesitate in turning in such a report was at the request or advice of a broker. We did not advise the refiners direct that we were delaying the report as our transactions were entirely with the broker. As a rule we did not communicate with the refiners.

[fol. 763] Loren H. Stevens was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am traffic manager of the Indianapolis Warehouse Company. Previously I was traffic manager for the Bradley Warehouse Company, owned by A. C. Bradley, broker for Pennsylvania and Hershey.

The Bradley warehouse stored only Hershey's sugar. The Pennsylvania sugars which Bradley handled were stored at the Coburn Warehouse Company.

Bradley had an arrangement whereby we took Pennsylvania sugars from the Coburn warehouse over to the Bradley warehouse so that the truckmen could pick it all up in one place instead of going 2 or 3 places for it. That is, the truckmen from the Bradley warehouse called at the Coburn warehouse for a truckload of Pennsylvania sugars and dumped it on the platform of the Bradley warehouse. When the customer came after the Hershey sugar and the order also contained packages of Pennsylvania sugar, he could get them both at the same place, saving himself extra trips. This arrangement did not cost the refiner anything. It was solely at the expense of the Bradley warehouse.

Chinal called on me in respect of this method of handling sugar in June, 1930. He objected to this trucking as a con-
[fol. 764] cession to the buyer. He said the process would have to stop and we did stop it 10 days thereafter.

Cross-examination.

By Mr. Peck:

At the time I started with Bradley they never stored Pennsylvania sugar nor did they while I was with them. If the buyer bought only Pennsylvania sugar he would call for it at the Coburn warehouse. This arrangement was used when Hershey and Pennsylvania sugars were both bought by the buyer.

[fol. 765] C. E. HERBERT was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am president of the Southern Distributing Company, wholesale grocers, at Norfolk, Virginia. In 1927 we did a $3,000,000 business and sold about 40,000 bags of sugar to retail grocers. We bought most of our sugar from the refiners and paid the full list price.

At that time we could occasionally buy a little cheaper from Federal. This company cut prices about 10¢ a hundred and continued to do so as long as we bought from them. We did not obtain any concessions after the formation of the Institute although we tried.

The rail rate from Philadelphia to Norfolk is 25¢ a hundred but the refiners now charge 12.9¢. In 1929 and 1930 they charged 21.1. The cheaper rate has been in effect about 6 months. This rate was paid no matter where the shipments came from.

In 1930 a new boat line, the Philadelphia-Virginia, running from Philadelphia to Norfolk, was organized. It cut the price to 10¢ a hundred in the spring of 1931. We ordered sugar shipped by that line but D. E. Taylor, broker for Pennsylvania, refused.

[fol. 766] Cross-examination.

By Mr. Higgins:

Before 1928 we bought from Federal, American, Pennsylvania and National and divided our business amongst them. The concession we got from any particular company or at any particular time depended on our arrangement with their broker on that particular purchase.

Most of the refiners carried a stock at Norfolk but Federal did not so they occasionally would cut prices 10 points in order to move sugar in carload lots. The other refiners did not meet that cut in order to keep part of our business. Sometimes we would order sugar from Federal and they would tell us they had no more available. Federal was what was known as a "limited seller."

If we went to American or any of the other refiners on a move we could get any quantity of sugar ordered but if we went to Federal we might or might not get the sugar. National and American sugars are the most popular in our territory. They were advertised widely and had specialty men among the trade all the time. We always bought Federal sugar when possible because we wanted to save every penny we could.

We dealt with all the sugar companies about equally, although National sold us more because it was next door and we saved the expense of hauling.

[fol. 767] For the past 2 years we have been buying Cuban sugar from Lamborn but before that we bought from the 4 domestic refiners. We use a considerable quantity of Cuban sugar now because it is 5¢ to 10¢ a hundred cheaper. We sell mostly packaged sugar, buying off-shore sugar in 100-pound bags mostly and the domestic refined in the 2 and 5-pound packages. Approximately 2/3 of the bag business is Cuban. All of it is not, because some of the customers want domestic refined.

For a concession of 5¢ or 10¢ a bag less than the American, National and Pennsylvania bag sugars, we have changed our business to the off-shore bag sugars.

Cross-examination.

By Mr. Fisk:

Prior to 1928 the 10¢ price cut that we obtained from Federal was not a special cut but one publicly announced. Everyone who bought a car paid the same price.

[fol. 768] GEORGE D. GRIFFIN was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I am vice-president of Schnull & Company, wholesale grocers, of Indianapolis, Indiana. We do a wholesale sugar business. I have been with the company over 40 years and have bought beet and cane sugar during that time.

Prior to January, 1928, the list price of refiners from time to time varied and concessions were given. Sometimes the concession was a straight price reduction. Other times it was in the form of cartage and where we stored in our own warehouse it was a storage concession. We did business with American, National, Pennsylvania, Federal and McCahan. We have not been able to get concessions since 1928.

The Central Public Warehouse does a general warehouse business. The building was bought in 1927 by the Schnull Realty Co. which leased one half of the building to Central and the other half to Schnull & Company, the grocery concern.

At the present time we warehouse some beet sugar but have done no cane business since 1930. Neither the warehouse company nor ourselves ever had any trouble with the refiners as to the manner in which we operated.

The warehouse company has been unable to pay its monthly rent, which was guaranteed by Schnull & Com-
[fol. 769] pany. The warehouse company has never paid any dividends or made any money.

Cross-examination.

By Mr. Peck:

The Schnull Realty Company was formed in 1927 for the purpose of taking over the warehouse building. Since we took over the actual operation of the warehouse in 1929, the rent for the space leased by the warehouse from Schnull Realty has been guaranteed by Schnull & Company, the grocery concern, which collects the rent because of the guaranty.

Schnull Realty is entirely owned by Schnull & Com-

pany, the grocery. Gustave A. Schnull is president of both companies. I am vice-president of the grocery company, an officer in the realty company and a substantial stockholder in the grocery company.

When the purchase of the Central Public Warehouse was made, the stock we had in the Coburn Warehouse was transferred to the Central Public Warehouse and we paid the regular warehouse storage for that space. These storage charges by the Central Public against Schnull & Company were set off against the rent.

Mr. Fly: I read the minutes of the Enforcement Committee of October 3, 1929, paragraph headed "Central Public Warehouse, Indianapolis, Indiana."

"A motion recommending to the Board of Directors that the Central Public Warehouse Co., Indianapolis, be disqualified for storage by members of the Institute, due to its affiliation with the wholesale grocery firm of Schnull & Co., was moved, seconded, and unanimously passed."

The portion of the rent which exceeded the amount Schnull & Company owed the warehouse for storage was [fol. 770] charged against the warehouse company, at least the rental was charged, and the other was credited. I do not think the excess was paid by the warehouse. I cannot say when the warehouse last turned any money over to us.

[fol. 771] SOLOMEN GOLDBERG was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am president of the Consumers Mill Products Company located in Kansas City, Missouri.

We sell sugar, flour and a full line of canned goods. In 1927 85% of all our business was sugar. Today 50% of it is sugar. The highest volume in business was done in sugar in 1927 when we handled 540,000 bags. We sold mostly to large retailers and manufacturers. They could buy direct from the refiner as well as me but we gave them longer

terms of payment and met the refiners' prices all the time.

We bought our sugar from 5¢ to 15¢ a bag less than the list price. In 1927 we bought cane sugar from Imperial and Godchaux and we sold a large quantity of beet sugar.

After the Institute was formed in 1928 we received no concessions. I talked to C. & H., Imperial and Godchaux. Moog of Godchaux told me he could not do anything for us at that time because his company was a member of the Institute. I called his attention to the fact that Godchaux was giving Edgar of Detroit a concession of 15¢ per bag and asked for the same thing. He explained he could not [fol. 772] make the allowance at that time because the arrangement with Edgar had been made prior to the formation of the Institute and they intended to fulfill this obligation. In trying to obtain a concession from Texas City I talked to Oscar Armstrong of their sales department. I asked him to allow us 5¢ to 10¢ a bag on some of our cane sugar which we were selling without profit. He said he could not do it. He said they were members of the Institute and would not dare make an allowance to any one.

We then reduced our sugar business to 1/3 and handled other lines. Next we bought our sugars from everyone, a little from C. & H., some from Western, some from Godchaux and some from Arbuckle. We had nowhere to go after the formation of the Institute. The refiners all maintained a uniform price.

A year ago I went to Barney of Lowry and told him I would buy 10,000 bags of sugar per month for 10 months if he would obtain a 10¢ concession to cover storage and other costs and allow me a 2¢ profit. We telephoned someone in New York and told me he would let me know the next day. The next day he said Lowry refused to sell sugars in Kansas City at a 10¢ concession because the interest which they represented was affiliated with the Insti- [fol. 773] tute and therefore they could not sell on that basis.

Since the formation of the Institute we have paid full list price on all our purchases. We have stopped selling to large buyers and confined ourselves to the smaller trade which is unable to buy from the refiner and purchases 1 to 30 bags at a time.

The freight rate from New Orleans to Kansas City is 65¢ and the barge rate 55¢. In 1928 and 1929 by the re-

finers' terms we could ship by barge if we paid in 14 days with no guaranty after the date of shipment. It takes about a month to transport sugar from New Orleans to Kansas City by barge.

We tried to get guaranties on barge shipments. We tried Godchaux and they told us they were members of the Institute. We finally made a contract with Sterling Sugars, Inc. of Franklin, Louisiana, which was not a member of the Institute or the Bureau, to deliver us sugar by barge.

Petitioner's Exhibit 312 was received in evidence.

At the time this contract was made other refiners were charging all-rail rates or giving us the privilege of shipping [fol. 774] by barge but we had to pay in 14 days after date of invoice and had no guaranty after that time. Since a barge shipment from New Orleans to Kansas City takes at least 28 days and sometimes 40, the refiners' guaranty of only 14 days is really no guaranty because the sugar is in transit at the time of the expiration of the guaranty.

We operated under the Sterling contract for only 6 or 7 months. Then in May, 1931, the refiners decided to allow a barge rate on rail shipments, which made it useless for us to buy from Sterling again. We received from Sterling a concession of 20¢, 10¢, plus the barge rate of 10¢. The 10¢ was given to cover the expense of handling the sugars, as we pay our own storage and insurance.

Refiners like C. & H. and Imperial sell sugar ex-warehouse at Kansas City. We could get immediate spot deliveries there whereas the Sterling sugars had to be shipped to us and we had to put them in a warehouse as soon as they arrived. We had to pay at least 1 month's and sometimes 2 months' storage.

Under the Sterling contract we could ship by barge-and-rail at a price which was guaranteed until actual delivery. [fol. 775] We asked Sterling to cancel the contract and they did. I had to go back again to the Institute to buy sugar as Sterling could not meet their price and terms because it carries no spot stocks. The other refiners not only introduced a barge-and-rail rate on rail shipments but gave us deliveries ex-warehouse at the barge rate. Prior to that time there was no absorption as they charged us the full 65c rate.

Cross-examination.

By Mr. Peck:

Prior to the Institute I was buying my sugar competitively. I had the privilege of going to a refiner and bargaining with him and telling him what I wanted to buy. Today I haven't got any rights. I have to come to the Institute to buy my sugar or not to buy at all.

Neither I nor the Consumers Mill Products Company, whom I represented, has ever owned, operated or had any connection with any warehouse in the United States.

My building, which is next door to the Scott's warehouse in Kansas City, was used as a garage for its trucks.

The Consumers Mill had a branch in St. Louis for about a year in 1928. We negotiated a lease for space in the St. Louis Terminal building. The lease was signed by Scott in the name of the Scott Warehouse and we moved into the Scott Warehouse space. In withdrawing sugar from consignment we sometimes withdrew from Scott Warehouse. The name Scott Warehouse was later changed to Safety Service Warehouse and both Scott and ourselves later moved into another building. We put up part of the money [fol. 776] with which Scott purchased the building and held a mortgage on it.

During the time we were located at 209 Bremen Avenue we drew sugar from the Safety Warehouse which was also located there.

I did not participate in the storage price which was paid to the Safety Warehouse. During the period we were located there at their warehouse we bought from Western, Utah-Idaho, Holly and Amalgamated. We also bought some, but not very much, from Texas City.

At this time the actual freight rate from the Texas City refinery to St. Louis was 57½¢. The freight application at that time was 50¢, New Orleans rail rate.

We shipped 1 or 2 cars to Mexico, Missouri. The difference in the freight rate between St. Louis and Mexico was 15¢ a bag. We paid the railroad 4½¢ for transiting from St. Louis to Mexico. The freight application from Texas City to Mexico was 64½¢.

I do not know that the Safety Warehouse was reporting to Texas City when sugar was sold to us at St. Louis.

The freight application from the Texas City refinery to

St. Louis was 50¢ and it cost 4½¢ to transit to Mexico. The 10¢ which we saved went to the purchaser. We did not make any profit on it. We sold the sugar outside of St. [fol. 777] Louis, obtained the transit billing, and then shipped the sugar. If I had a chance to do it again I would.

Salisbury and Kirksville, Missouri, are between St. Louis and Mexico and we used the same method of getting sugar to those 2 places as we did to Mexico. I cannot tell how much Texas City was out of pocket for the freight it had to pay for these manipulations.

Redirect examination.

By Mr. Rice:

We were in the Safety Warehouse about 7 months and then we abandoned our branch in St. Louis. We could not operate under the regime of the Institute. It is no longer profitable for us to deal in any sugars so we have had to go into other lines.

Recross-examination.

By Mr. Peck:

I do not recall that about the time Texas City learned of the transit to Mexico, Missouri, they sent a bill for $90 in respect of the cars which we had transited to Mexico. If they did I never paid them.

[fol. 778] JACOB F. GIERING was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I am president of the J. F. Giering Bottling Company, Inc., of Youngstown, Ohio. Our company manufactures soda water, ginger ale, root beer and carbonated beverages.

We purchased sugar from the cane sugar refiners for use in our manufacturing business. We generally bought our stock from the Fisher, Gilder Warehouse. In those days

Youngstown was a consignment point and for that reason we bought through brokers, not jobbers.

The refiners stopped storing sugar in Youngstown in 1929 and we can no longer draw from consignment.

If a broker telephoned me and said the price was going to advance I bought as many bags of sugar as I needed. I paid for it but kept them in the warehouse until they were to be used.

Cross-examination.

By Mr. Browning:

After the withdrawal of the consigned stocks it was still possible for me to obtain deliveries from the refiners in carload lots or to buy transit stocks from jobbers in Youngstown, each for immediate delivery.

[fol. 779] We also have the privilege of pooling cars, that is, we can buy sugar in less than carload lots in combination with other purchasers. That is what we are doing now and no objection has ever been made.

Philip H. Cass was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I am the sugar buyer for the Continental Baking Corporation, which has 100 bakeries scattered over the country. Our headquarters are in New York.

In 1928 we used about 500,000 bags of sugar, most of which was beet.

The company has a bread plant in Youngstown for which it buys sugar. Prior to the spring of 1928 the Youngstown plant withdrew its supply from consignment. After the elimination of Youngstown as a consignment point our plants around Youngstown and Akron made up pooled cars. Later we were able to obtain beet sugar deliveries by truck in l. c. l. lots from Edgar & Son of Detroit. We paid nothing extra for the beet sugar.

All of our cake plants, with the exception of those in the Metropolitan districts, buy in carload lots.

We do our own storing. On cane sugar we do not get a lower price on carload lots which we store ourselves than we do on the l. c. l. quantities and I do not think we do on the beet sugar at the present.

We now buy our cane sugar from American and have bought from National and Arbuckle. On the Pacific Coast [fol. 781] we buy from C. & H. and Western.

Prior to 1928 we were allowed some delayed billings on purchases from consigned stocks and obtained a price guaranty between the date of shipment and the date of billing. The delayed billing was 30 days from date of arrival. We cannot get such terms now because they have been discontinued. Prior to 1928 the refiners were more liberal than they are now in extending the time for shipments.

Petitioner's Exhibit 313 was received in evidence.

Cross-examination.

By Mr. Higgins:

The special terms Continental received before 1928 in the purchase of sugar were delayed billings and a guaranty from date of shipment to date of billing. These terms were not in accordance with the refiners' publicly announced terms.

We have had no difficulty in securing plenty of sugar for delivery at Youngstown since its elimination as a consignment point except that we have to buy in larger quantities than before, that is, either a carload or l. c. l. in a pooled car. Before Youngstown was changed as a consignment point and before we started using beet sugar we pooled cars for our plants only at Youngstown and Akron.

[fol. 782] JOSEPH E. WEIL was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am one of the partners of Weppner, Weil & Company, jobbers of sugar and coffee in Cleveland. We handle ap-

proximately 200,000 bags of sugar per year, 90% of which is American.

We handled this large percentage because in building up their brand in Cleveland several years prior to the formation of the Institute we received certain concessions running up to 35¢ per hundred as compensation for our efforts.

The Domino brand of American sells much more easily in my market than the other brands. Sometimes we could get 10¢ per hundred more for it than for McCahan's, sometimes 5¢ more.

Immediately after the formation of the Institute, I was informed by White, sales manager of American and its broker in Cleveland, Hellwig, that we would no longer receive concessions.

By the Court:

At the time we began to sell American sugar National sugar was the big seller in Cleveland and we were one of the jobbers handling it. American had a policy of getting the good will of various jobbers throughout the country. American's policy was to sell directly to small retailers instead of merchandising through regular jobbing channels. When we started with their brand we had to [fol. 783] overcome a certain amount of sales resistance with the retail trade. There is a customer demand built up by the retailer who gets into the habit of buying certain brands. The minute a substitute is offered he wants to know the reason why. I had to overcome the sales resistance on the part of retailers who had bought National sugar from us heretofore.

In many instances we had to offer a concession in order to get the brand started. We sometimes had to build it up slowly by getting our customer to take a little of Domino and a little of National. Every jobber has good will built up with the retail trade and it will follow the jobber in whatever brand he is attempting to establish.

In some, but not in all, instances we were giving to retailers a concession on American that we did not give on National. The concession which we were obtaining varied as did the concession we were giving. At no time did we give the retailer the entire concession we were receiving from American. American did not know and was not interested whether or not we were passing on the concession.

By Mr. Rice:

Before the Institute we bought sugar on 30-day contracts [fol. 784] as well as for longer periods. I cannot recall an instance before the formation of the Institute when we were strictly forced to take out sugar for 30 days even though we signed a 30-day contract. Although the contract provided for delivery within 30 days we had a verbal understanding with the broker and with Brownlee of American that this requirement would not be in force. If our requirements were 20,000 bags per month and we ordered 60,000 it was understood that the contract was to run for 3 months.

We buy only on an advancing market. If the market declined after a contract was entered, delivery was held up until the market again advanced or the contract was set aside. Meanwhile we bought spot sugar or entered into another contract at the lower price.

Immediately after the formation of the Institute Hellwig and White told me that we would no longer receive concessions. Hellwig said he would have to abide by rulings of the Institute, that the Code of Ethics had been adopted and that he would have to adhere strictly to those rulings. White said several times that there was no way whereby we could get concessions, that it could not be worked out and as long as they were members of the Institute they [fol. 785] were going to adhere strictly to its rulings.

I also spoke with the assistant sales manager of Arbuckle. He said they were offering no concessions and would adhere very strictly to the Code of Ethics.

I talked with Huber, broker of Pennsylvania, when he brought the assistant sales manager with him. We had a discussion in February 1931 during which he said he had no concessions to offer and would not have any as long as the Institute lived.

In 1930 Fox, broker of McCahan, and his Cleveland representatives came to my office soliciting business. I told him he could not get our business unless he had some concession to offer. A day or two later his local representative offered to give us the privilege of buying any time within 3 weeks after an advance at the price if we would give him a substantial part of our business. I told him that unless the proposition was put in writing I was

not interested. He said he could not because of the Institute ruling but that it could be handled secretly.

Hellwig told me that a good many things would be straightened out after the Institute was gone.

During one period after the Institute was formed, we were unable to buy f.o.b. refinery but had to pay an arbitrary freight rate. I asked Hellwig if we could arrange for a barge shipment from refinery. He said "No, it couldn't be done at that time, it was against the code". If we could have purchased f.o.b. refinery and shipped by barge we could have saved 13¢ per hundred.

[fol. 786] In the latter part of 1931 I purchased 50,000 bags from American through Hellwig. At the time the market appeared favorable and I told him a good speculative profit was available and asked him to find out from American if we could get more than 30 days under the contract as I would not think of buying any such quantity unless I had some assurance that we would not be held strictly to the 30-day period. He said he talked to White who assured him a 30-day contract would not be enforced and with that understanding I signed a 30-day contract.

Sixty days later 15,000 bags were undelivered and the market turned soft. I became uneasy and wanted to sell the sugar secondhand. I sold a Cleveland buyer 5 cars of sugar and turned the order over to the broker, telling him to make shipment on that buyer's order to points outside of Cleveland. The broker told me that he had called New York about the transaction, talked with White and he said it was all right. Within a few hours' time the broker called back and said White had called him again and said he made a mistake and that upon looking up the Institute rules and the Code of Ethics he found he had no right to accept the order. Hellwig told me he could not accept an order after 30 days except from the signer of the contract [fol. 787] and that we would have to take delivery of all the sugar. My strenuous objections accomplished nothing. Hellwig agreed with me but he said "We are bound by the rulings of the Institute".

It was my contention that since the refiners were only selling f. o. b. refinery it made no difference to them where the sugar was shipped as I had to pay the freight to the ultimate destination. The refiner admitted there was no increased cost to him. If we had reshipped from Cleve-

land to the party who purchased from us, we would have lost the advantage of the through rate. We eventually lost money on this contract because the market declined.

There was no objection to taking deliveries after 30 days until I tried to make a resale.

At one time I told White I could not understand how prices were held up or why they were advanced on some occasions in view of the cost of raws. He said it was to protect the buyers and give them an opportunity to dispose of their 30-day supplies.

On March 19, 1930, the refiners announced a 10¢ advance in price effective March 20. On March 20 the refiners announced that the old price would be continued and another advance in price made later on the same day. On March 20 the refiners announced a 15¢ reduction in price. [fol. 788] On April 3 they announced an advance of 20¢ in price on guaranty and non-guaranty contracts, effective that date.

On May 21 they announced a reduction in price and that the 30-day clause would be strictly enforced. The amount of the reduction was not stated. They referred to all future contracts. I was told by Hellwig that the 30-day clause of contracts made April 3 and those made prior thereto were not being strictly enforced. The price did not decline until 1 month and 17 days after April 3.

On August 20 the refiners announced a reduction in price of 10¢ effective August 19 which brought the price down to 4.40. On the same day a further announcement was made that the prices would be advanced as of August 22 to 4.50. Later on August 20 the refiners announced a reduction of 5¢, bringing the price down to 4.35 effective at once, retroactive to the 19th. The 5¢ was in addition to the 10¢.

The first announcement was made because there had been a lot of confusion on account of the changes that had been made. The net result was that contracts made on the 19th were cut 15¢. Contracts made on the 20th and 21st were at a price of 4.35 and contracts made on the 22nd and thereafter were made on a 4.50 basis.

[fol. 789] Mr. Rice: I wish to state that Willett and Gray's figures indicate that on August 18, 1930, raw sugars were quoted at 3.16, continued at 3.16 until August 22nd when that dropped to 3.12; that Willett and Gray quote refined

cane sugar on August 19, 1930, at 4.312 and on August 20th at 4.263, a differential on August 20th of 1.10 and three-tenths.

The prices on the memorandum do not correspond with those Willett & Gray quote for refined sugar because I have not considered the 2% discount. The prices actually, because of their retroactive effect, were the same from the 19th to the 20th.

Cross-examination.

By Mr. Peck:

Prior to the formation of the Institute it was the rule rather than the exception that price advances were made effective immediately. Occasionally refiners announced they would advance the next day or even the day after that. Sometimes other refiners would follow and sometimes they would not.

Since the Institute, price announcements have uniformly been announced to take effect on the next day or within a day or two. Sometimes the refiners have followed and sometimes they have not.

We started obtaining concessions from American in May, 1923. They varied according to the packages or the units that were bought. On 100-pound bags we obtained concessions in more than one way.

Sometimes after a period had elapsed and after a price advance we were permitted to buy at the old and lower price. We received a straight price concession of 5¢ on 2 and 5-pound cartons and occasionally an additional 5¢ con- [fol. 790] cession if there were no warehouse charges. We received a concession of 35¢ a hundred on soft sugars. There were other occasions when we received concessions which depended on market conditions at the time.

American, covering a wide territory, sometimes did not find it advisable to tear down their price structure all over the country and they would give us a concession in addition to our regular concession.

The straight price concessions were paid by check. The other concessions were not.

There is a term in the sugar trade known as "vest pocket order". Many times the sales manager of American offered me a contract for a certain amount of sugar at a price 10¢

under the market. This contract was in addition to the warehouse concession and protected us if the market advanced. It was offered to special customers who underestimated their requirements.

The "vest pocket orders" were entered into in anticipation of an advance and became effective after the advance took place. We frequently used them, especially if they were profitable.

Our concession on 100-pound bags of bulk sugar was the smallest that we received. It was limited to 5¢ and paid [fol. 791] by check. On cartons we had an additional rebate that amounted to either 5¢ or 10¢ off the list price.

When we sell American sugar today we do not get more for it than for other brands. We get one price for all of our cane sugar. We do not get any more for our American sugar as a regular matter than other jobbers get for their standard brands. Today we pay no more for American sugar than for other standard brands.

When I started to sell American's sugar, National's was sold exclusively by jobbers in the market. Prior to that time American's sugar was not sold by other jobbers or retailers in large amounts. We did not receive the same concessions from National that we did from American.

Several months ago Carroll, assistant sales manager of Arbuckle, refused to give me a concession. He said that it was against the rules of the Institute and that Arbuckle never had given concessions.

The McCahan representative with whom I spoke was Duke. He offered me the privilege of buying McCahan sugar at the old price within 3 weeks after an advance. [fol. 792] He said he could arrange to have me get the sugar from some selling outfit he had in Chicago 3 weeks after the price went into effect. In my testimony yesterday concerning the buying outfit in Chicago, I was trying to elaborate upon what was actually said. I gave my testimony by simply putting 2 and 2 together and adding gossip which I have heard since.

From April 30, 1929, to May 5, 1931, the rail-and-lake rate was 39¢. Since that time it has been 29.2 and I have not tried to buy f.o.b. refinery. I do not know how many years prior to April 1929 I could buy f.o.b. if I wanted to. I only tried to when it was to my advantage. Prior to that time I never tried to buy f.o.b. and have never bought f.o.b.

Defendants' Exhibits S-1 and T-1 were received in evidence.

Redirect examination.

By Mr. Rice:

Prior to the formation of the Institute there were refiners other than Arbuckle whose list price varied from 5 to 15¢ from that of other refiners.

After the formation of the Institute list prices were the same at all times except when an advance in price was taking place.

[fol. 793] Before the Institute we received concession of 5¢ to 35¢ on sugar. The 35¢ was on soft sugar. On 100-pound bags of granulated we received a concession of 5¢. We would buy under a list price which had nothing at all to do with the concessions that we were receiving in a lump sum at the end of the month. We were receiving a regular concession of 5¢ on the bulk granulated and what we received on the so-called "vest pocket orders" varied from 5¢ to 15¢ a hundred.

Prior to the formation of the Institute when we handled off-brand sugars it was purely an accommodation for someone and in those cases we got the same price for it. Occasionally we were unable to sell and therefore made a concession to get rid of it but we attempted to maintain one price.

Recross-examination.

By Mr. Peck:

A "vest pocket" contract was (1) a contract entered into which was to be made a firm contract in case of an advance, in which case the purchaser would get the benefit of the old price, or (2) a contract which was entered into at an old and lower price, after an advance had taken place.

[fol. 794] B. M. Ruse was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am general manager of Bridgeman, Russell Company of Duluth, a general diary products company. It also does

a dry and cold storage business and its gross volume per year is approximately $10,000,000. We have dairy plants at 24 points throughout the country. In most of the plants we manufacture some ice cream and use sugar and cerelose. We use about 2 cars of cane sugar and cerelose per year.

We have a 7-story storage house in Duluth of reinforced steel and concrete. We store various commodities and are a public bonded warehouse. About 50% of our dry storage business is sugar.

We had some difficulty with the Institute in 1929 about storing sugar.

Petitioner's Exhibit 314 was received in evidence.

I explained our position to Taylor of the Institute and told him we did not like to lose the sugar storage business. I said we would be willing to divorce our warehouse from our other business and make a separate corporation out of it or we would try to use some other kind of sugar in [fol. 795] place of granulated.

We offered to use invert sugar but he said no. He did not want to do anything to drive any sugar business away. The Institute would rather encourage the use of sugar if it could.

We also offered to give a bond, give them a record of the purchases of sugar that we made from various sources, if we could buy outside of brokers and refiners.

At Taylor's request I wrote him a letter outlining the situation.

A few days later we received a telegram to the effect that they would make an exception in our case if we arranged to buy our sugar from other than refiners or brokers or those people who were tenants in our building.

Cross-examination.

By Mr. Peck:

I was not asked to post a bond or asked to use invert sugar nor to separate and divorce our warehouse business. I had a very nice interview with Taylor and later they withdrew their objection.

[fol. 796] JOHN A. TAYLOR was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Fly:

I am a wholesale grocer of Wilmington, North Carolina, and have been selling cane sugar for some years.

Prior to the formation of the Institute the refiners maintained consigned stocks at Wilmington. All the wholesalers drew on them as their source of supply. We had a limited capital and only drew from day to day as sugar was needed. We could always depend on assortments and did not have to store the goods and incur storage expense.

Prior to the time the refiners offered storage facilities we had to buy sugar in carload lots and we could not determine the exact assortment which the trade demanded. When the consignment plan was adopted the refiners carried the assortment at Wilmington and we could draw on it for anything we needed.

The consignment plan facilitated the handling of sugar by distributors and was essential to meet competition of other vicinities.

After the consignment points were abandoned in the summer of 1931 and our business decreased materially, I protested. We had to buy in carload lots and were unable [fol. 797] to forecast, with any degree of accuracy, the demand for various packages. We found ourselves with a surplus of one size and a shortage of another and were not in a position to compete with wholesalers in Charleston, Norfolk and Savannah.

Our competitors needed less capital to secure stocks for the trade and sugar was available at the distributors' calls since the refiners carried full supplies at those points. We had to pay the cost of storage and insurance which we had not done previously.

Before Wilmington was eliminated as a consignment point we normally sold in Fair Bluff, Lumberton, Tabor and Loris, North Carolina. Afterwards our business gradually fell away. We were so handicapped by lack of stock that we almost abandoned the sugar business. In competition the price is not always determinative. Assortment and cost are also material.

We talked to the brokers of American, Franklin and Hershey soon after Wilmington was eliminated as a consignment point and protested against the withdrawal of these

facilities, the denial of our right to compete in our own territory, the loss of business and the possible loss of the Clyde Line Service into Wilmington.

The Clyde Line is a steamship company that has been [fol. 798] in service for 50 years and the principal tonnage carried was sugar. When the consignment plan was abandoned their tonnage was materially reduced. In July, 1931, it abandoned the service.

Fenel, American's broker, said his business had been very materially reduced. Parker, broker for Franklin, made the same statement. When I told him I had lost and was losing business for the reasons I have previously given, he said that he was very hopeful that Wilmington would be restored as a consignment point and that he was in sympathy with the efforts to have it restored.

Two years ago Hershey began shipping sugar into Wilmington from outside the United States. Their representative, Peck & Company, called on me and asked about my business. He said he was going to apply the New York base plus the New York freight so that his price would be equal to that of New York. I stated that unless he made Wilmington a base point, the same as he did Baltimore, New York or Savannah, I did not see that he made any contribution to our sugar facilites. I objected because it cost Hershey no more to ship to Wilmington than it did to New York and contended that Wilmington should be a base point, the same as New York. At the time of my [fol. 799] conversation with Hershey the freight application from New York, Philadelphia, Baltimore or Charleston to Wilmington was 20.6¢ and the barge rate to Wilmington was 15¢. There was no barge service to Charleston.

In the summer of 1931 American made Charleston, South Carolina, a base point, the same as Philadelphia, Savannah and New York, even though no refinery was located there, and the 20.6¢ rate was eliminated.

We protested to the brokers and wrote letters protesting against this injustice. At the same time the rate from Baltimore to Norfolk was reduced to 10¢ and from Baltimore to New Bern, North Carolina, to 15¢ while the Wilmington base remained at 20.6¢. We protested vigorously and the situation was relieved in a measure by the withdrawal of the basic rate for Charleston and the application of 15¢ for New Bern, Wilmington and Charleston.

But in January, 1932, Charleston was again made a base point. I had a long interview with the manager of American's Baltimore office. He said the situation in Charleston resulted from the action of Hershey and that they had to meet it. I protested that Charleston had a cost 15¢ less than we had and that it simply meant the abandonment of our business. He said he recognized that it was a situation he very much regretted but disclaimed responsibility.

[fol. 800] Sugar is now delivered from Charleston to all the points I enumerated and also Lumberton and Fair Bluff in upper North Carolina and lower South Carolina. We could no longer compete within that territory.

Prior to the formation of the Institute I did not always pay the list price for sugar. There was a general conformity of price but there was always a possibility of trading. Federal constantly sold at prices below the normal market and we bought their sugar but we can no longer do so now. The rebate was not secret but was a straight discount from the bill.

Cross-examination.

By Mr. Browning:

Formerly, when competition was based on freight rates which were determined by mileage, our trade area included all points from Wilmington to Marion, South Carolina, and all of North Carolina.

Ten years ago Wilmington jobbers sold in the central part of the state but since 1925 we have been confined to the territory within a radius of 100 miles of Wilmington even though it is now a consignment point. We can recapture that area if Wilmington were made a base point. We were handicapped further when Charleston was made a base point in the summer of 1931.

[fol. 801] The Norfolk jobber is unable to compete with the Wilmington jobber within the 100-mile radius and has not been an important factor since 1925. Our greatest competitor is the Charleston jobber.

Prior to the time in 1931 when Charleston was made a base point the Charleston jobber competed in our territory because certain refining companies absorbed the difference in rates for the jobbers in the interior.

The Charleston jobber sells to retailers in a trade area 100 miles around Wilmington. He began when Wilmington was discontinued as a consignment point a year and a half ago and continued several months but it is difficult to re-establish broken trade alignments. The refiners restored Wilmington as a consignment point but at the same time made Charleston a base point, thereby permitting its jobbers to sell its sugar within 17 miles of Wilmington.

When Wilmington was discontinued as a consignment point we bought sugar from American, Franklin and Hershey in carload lots on contract.

We have been buying from Hershey ever since Wilmington was first eliminated as a consignment point. We buy more bulk sugar from them than from American.

[fol. 802] I had the privilege of buying on the 4-payment plan and paid in 4 instalments instead of 1. The refiners guaranteed the price for the undelivered part of the contract. If I purchased a carload of sugar on the 4-payment plan I would draw it and have it consigned to me and pay for it weekly. If the price declined before later instalments became due the refiner rebated the amount of the decline.

It took 2½ days to ship sugar from Baltimore to Wilmington by the Clyde Line. The schedule was satisfactory and we had no difficulty in obtaining prompt deliveries.

My objection was that after the elimination of Wilmington as a consignment point we had to anticipate our customers' wants and know what assortments they would demand. Very often we had too much of one assortment and not enough of another. As long as we had a consignment stock in Wilmington we never thought what our trade would need, but on receipt of an order called up the warehouse. We did not anticipate in any degree what our trade wanted but we had to do so after Wilmington was eliminated as a consignment point.

Pennsylvania also ships by rail to Wilmington. On [fol. 803] barge shipments the rate is 15¢ and on rail shipments around 32¢. The freight application is the barge rate so on rail shipments the refiner absorbs 17¢.

Wilmington was eliminated as a consignment point in the summer of 1931 and was restored in November 1931.

Conditions have been so unsatisfactory that we have not

tried to push sugar. I do not believe anybody ever made money on sugar in my line. I do not believe any jobber expects any profit on sugar. We have not made much profit since 1922. We have to carry sugar simply as a self-defense and as a necessary evil.

Prior to the Institute, Federal prices were often lower than those of the other refiners and on such occasions we bought their sugar. I supposed that we were buying it at 10¢ under the other refiners' list price and supposed we were getting a special inside cut. Sometimes the condition would only exist for a day or two and then the price would go back. They were not uniformly below the list price. They were just periodic and for a limited time only.

Redirect examination.

By Mr. Fly:

I wrote a letter to the Attorney General on March 31, 1931, protesting against the withdrawal of Wilmington as a consignment point.

Recross-examination.

By Mr. Browning:

The letter refreshes my recollection to the point that Wilmington must have been eliminated some time before March 1931. I don't remember when it was eliminated but it was prior to that date.

[fol. 804] CARL HENRY WORTZ was called as a witness on behalf of the petitioner.

Direct examination.

By Mr. Rice:

I am in the biscuit and storage business and operate 2 companies, the Wortz Biscuit Company and the Wortz Storage Company. I am secretary and treasurer and office manager of both corporations, which are located at Fort Smith, Arkansas. The biscuit business uses 12 cars of sugar a year.

The Wortz Storage Company is a steel-girded concrete building opposite the biscuit plant and connected with it by an over-head tunnel. One-quarter of the building is arranged for the storage space which the biscuit company rents from the storage company and in which the manufactured goods of the biscuit company are stored and shipped. The balance of the building is used by the storage company as a public warehouse for food products only.

The warehouse is situated on a railroad track. Its unloading doors are car-door high. Trucks can be backed up to an unloading door at the side of the building. The front door is on a level with the street and the trucks can drive into the building to the storage piles and load if they wish or lower on the side door where it is level for handling. [fol. 805] At one time we stored sugar in our warehouse and there were never any complaints as to the method of handling.

Godchaux' representative, Pailet, investigated our warehouse before storing sugar with us. He said that he had been informed that we were on the Institute's black list and I told him we had similar information and that I heard we were not properly organized to store sugar. I said that no investigation had been made but that we wanted one because I thought we were being dealt with wrongfully. He returned that afternoon and said everything was as it should be and that he would be glad to store sugar with us.

After the second car arrived, we received a letter from Godchaux advising that they had been forced to discontinue storing sugar with us.

I have always reported withdrawals of sugar from our warehouse on the evening of the day it was withdrawn and never delayed making the report.

When we purchased sugar for the biscuit company we bought it as advantageously as possible and did not necessarily purchase from the stock consigned in our warehouse, though we did buy some of it that way.

Prior to the time of the Godchaux correspondence we [fol. 806] stored sugar for Henderson. They discontinued without any written notice. Their local broker, McNatt, just advised me they were unable to continue storing. Godchaux' local broker, Hagner Brokerage Company, advised that they would discontinue storing sugar with us because the Institute found against us.